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25-5-5  
No. 12062

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United States  
Court of Appeals  
for the Ninth Circuit

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ROBERT H. GAULDEN,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY and  
PACIFIC FRUIT EXPRESS COMPANY,  
Appellees.

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Transcript of Record

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Appeal from the United States District Court  
for the Northern District of California,  
Southern Division

FILED

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PAUL P. O'BRIEN,  
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California.

Attorneys for Defendants and Appellees.

In the District Court of the United States,  
Northern District of California,  
Southern Division

No. 27065-G

ROBERT H. GAULDEN,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
PACIFIC FRUIT EXPRESS COMPANY, a Corporation and JOHN DOE COMPANY, a Corporation,

Defendants.

COMPLAINT FOR DAMAGES: PERSONAL  
INJURIES  
FIRST CAUSE OF ACTION

Plaintiff complains of defendants and for first cause of action alleges:

I.

That at all times herein mentioned defendant, Southern Pacific Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and doing business in the State of California and in other states; and that said corporation has its principal place of business in the State of California, in the City and County of San Francisco; that said defendant was at all times herein mentioned and now is engaged in the business of a common



carrier by railroad in interstate [1\*] commerce in the State of California and other states.

## II.

That at all times herein mentioned defendant, Pacific Fruit Express Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Utah, and doing business in the State of California and other states; that said defendant, Pacific Fruit Express Company, was at all times herein mentioned, and now is, engaged in the business of a common carrier by railroad in interstate commerce in the State of California, as well as other states.

## III.

That at all times herein mentioned defendant, Pacific Fruit Express Company, is and was owned by defendant, Southern Pacific Company and was acting in the furtherance of interstate commerce for defendant, Southern Pacific Company, in that at all times herein mentioned there existed between defendant, Southern Pacific Company, and defendant, Pacific Fruit Express Company, an agency contract dated and made effective July 1, 1942, providing that defendant, Pacific Fruit Express Company act as agent for defendant, Southern Pacific Company, in icing railroad cars used in interstate commerce for and on behalf of defendant, Southern Pacific Company; that at the time of the accident to plaintiff hereinafter mentioned, defendant, Pacific Fruit Express Company, was engaged in a

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

joint enterprise with defendant, Southern Pacific Company, for their joint benefit and in the furtherance of interstate commerce by defendants, Southern Pacific Company and Pacific Fruit Express Company.

#### IV.

That at all times herein mentioned plaintiff was employed by defendant, Southern Pacific Company or defendant, Pacific Fruit Express Company, or both of said defendants, in such interstate commerce, and the injuries to plaintiff hereinafter [2] set forth arose in the course of and while plaintiff and said defendants, Southern Pacific Company and Pacific Fruit Express Company, were engaged in the conduct of such interstate commerce.

#### V.

That this cause of action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, et seq.

#### VI.

That on or about the 7th day of June, 1946, at or about the hour of 5:30 a.m. thereof, plaintiff was employed by defendant, Pacific Fruit Express Company or defendant, Southern Pacific Company, or both of said defendants, as an iceman working in said defendants' yard at Bakersfield, County of Kern, State of California.

#### VII.

That at said time and place, in the regular course and scope of his employment by defendant, Pacific Fruit Express Company, or defendant, Southern Pacific Company, or both of said defendants, as

aforesaid, plaintiff, together with other employees of defendant, Pacific Fruit Express Company or defendant, Southern Pacific Company, or both of said defendants, was engaged in moving certain refrigerator cars used in interstate commerce by defendant, Pacific Fruit Express Company or defendant, Southern Pacific Company, or both of said defendants, in said yards; that in the course of said operation plaintiff was negligently and carelessly ordered by his foreman, who was then and there an employee of the defendant, Pacific Fruit Express Company or defendant, Southern Pacific Company or both of said defendants, and who was acting in the course and scope of his employment, into an unsafe place of employment in that he was ordered to go behind a refrigerator car that had been unloaded in order to aid the momentum of said car by pushing the same while said car was [3] kicked by a loaded ice car to the rear of said empty car; that at said time and place plaintiff was negligently ordered by said foreman to push said empty car while said foreman negligently ordered other employees of defendants to set the rear loaded ice car in motion by use of a rope extending from a winch hooked on to the box car behind the empty car and said winch was then set in motion and the loaded car proceeded to move against the empty car which was being shoved by plaintiff. At said time and place and while plaintiff was pushing said empty car, pursuant to said order, a left front wheel of said loaded ice car ran over the right leg of plaintiff:

that as a proximate result of the carelessness and negligence of defendant, Pacific Fruit Express Company or defendant, Southern Pacific Company, or both defendants, as aforesaid, plaintiff received the following injuries:

Plaintiff's right leg was cut off and amputated eight inches below his right knee cap. Plaintiff alleges that said injury is permanent. Plaintiff has also suffered grievous shock and pain by reason of the aforesaid.

#### VIII.

That at the time of the happening of the aforesaid accident plaintiff was a strong and able bodied man, capable of earning, and in fact earning, the sum of One Hundred Eighty Dollars (\$180.00) a month straight time, plus overtime in varying amounts as an iceman; that as a direct and proximate result of the negligence of the defendant, Pacific Fruit Express Company or defendant, Southern Pacific Company, or both defendants, as aforesaid, and the injuries proximately caused thereby, plaintiff has been unable to follow his usual occupation and in the future will be permanently disabled from following his usual occupation, all to his damage in the sum of One Hundred Fifty Thousand Dollars (\$150,000.00). [4]

#### IX.

That in the necessary treatment of said injuries, plaintiff has incurred expenses for medical services and for the purchasing of an artificial leg, and prays leave of this Court to amend this complaint by incorporating herein the reasonable value of the

said services and articles when the same are ascertained.

X.

That by reason of the premises plaintiff has been damaged in the sum of One Hundred Fifty Thousand Dollars (\$150,000.00).

Wherefore, plaintiff prays judgment against the defendant, Pacific Fruit Express Company or defendant, Southern Pacific Company, or both defendants, in the sum of One Hundred Fifty Thousand Dollars (\$150,000.00), together with such special damages as may be hereafter ascertained and for his cost of suit herein and for such other relief as may be proper in the premises.

Dated March 14, 1947.

ROBERT H. GAULDEN.  
RYAN & RYAN,

By DANIEL V. RYAN,  
Attorneys for Plaintiff.

[Endorsed]: Filed April 1, 1947.

[5]

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[Title of District Court and Cause.]

ANSWER

Comes Now, Southern Pacific Company and Pacific Fruit Express Company, defendants above named, and each severally answering the complaint of the above named plaintiff on file herein, shows as follows:



## I.

At all times mentioned in the complaint and herein, and in respect of the matters referred to in the complaint and herein, admits:

Defendant Southern Pacific Company was a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and qualified to do business, and doing business in the State of California, and other States, and was engaged, among other activities, in the business of a common carrier by railroad in interstate and interstate commerce in the State of California and other states. In the State of California said defendant has a principal place of business in the City and County of San [6] Francisco. Defendant Pacific Fruit Express Company was a corporation organized and existing under and by virtue of the laws of the State of Utah, and qualified to do business, and doing business, in the State of California, and other States. Defendant Southern Pacific Company was the owner of certain of the shares of the capital stock of defendant Pacific Fruit Express Company. Defendant Pacific Fruit Express Company was engaged in an independent business, in the course of which, among other activities, said defendant Pacific Fruit Express Company supplied refrigeration service and icing of cars and commodities at the instance of defendant Southern Pacific Company, and other railroads, under and pursuant to certain contracts between defendant Pacific Fruit Express Company and defendant Southern Pacific Company and other railroads.

One of said contracts, dated July 1, 1942, and in effect at said times, provided among other things, that defendant Pacific Fruit Express Company supply to defendant Southern Pacific Company refrigeration of certain commodities and icing of certain cars, said defendant Pacific Fruit Express Company to perform such services by and through its own employees. Said contract of July 1, 1942 also provided that defendant Pacific Fruit Express Company, in the course and conduct of its said independent business, perform said services as agent of defendant Southern Pacific Company, in the sense of agent of defendant Southern Pacific Company as distinguished from said defendant Pacific Fruit Express Company performing said services as the agent of the shippers or consignees of said commodities, or the customers of defendant Southern Pacific Company. Said services were in furtherance of the independent businesses of each of the defendants Southern Pacific Company and Pacific Fruit Express Company, to the extent, but only to the extent, that the supplying of any commodity or service by one engaged in one independent business to another engaged in another independent business is in furtherance of the independent business of each. [7]

On June 7, 1946, at about 5:30 a.m., plaintiff was employed by defendant Pacific Fruit Express Company as an iceman at the Ice Plant of said defendant at Bakersfield, County of Kern, California. At said time and place plaintiff was engaged in unloading ice from certain refrigerator cars. In

the course of said unloading, plaintiff assisted other employees of defendant Pacific Fruit Express Company in pushing a certain empty car, which had just been unloaded, so as to clear the unloading platform for the next car to be unloaded. The loaded car was being pulled up to the unloading platform by a cable and winch. At said time and place and while plaintiff was pushing said empty car as aforesaid, plaintiff fell and the wheels of the loaded car passed over his right foot which was later amputated by surgery.

## II.

Defendants Southern Pacific Company and Pacific Fruit Express Company are, and each of them is, without knowledge or information sufficient to enable them, or either of them, to form a belief as to the truth of the allegations of the complaint in respect to the nature and extent of plaintiff's injuries, except as hereinabove admitted. Defendants Southern Pacific Company and Pacific Fruit Express Company, and each of them, denies each and every remaining allegation contained in the complaint not hereinabove admitted or denied, and denies that they, or either of them, or any of the officers, agents, servants, or employees of either of them was negligent in the premises, or in respect of any of the matters alleged in the complaint, and denies that any alleged negligence thereof was a cause, proximate or otherwise, of said accident, injuries or damages, if any, alleged by plaintiff.

And For a Second, Separate and Independent Answer and Defense to the complaint defendants each severally shows as follows: [8]

## I.

Each defendant here repeats and alleges all of the matters and things set forth in Paragraph I of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. Plaintiff was negligent in those matters set forth in the complaint, and negligently conducted himself on and about said cars, and negligently performed his duties as an iceman, with the result that he was injured. Said conduct of plaintiff, as aforesaid, proximately caused and contributed to the alleged accident, injuries and damages, if any, alleged by plaintiff.

And For a Third, Separate and Independent Answer and Defense to the complaint defendants each severally show as follows:

## I.

Each defendant here repeats and alleges all of the matters and things set forth in Paragraph I of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. Plaintiff was negligent in those matters set forth in the complaint, and negligently conducted himself on and about said cars, and negligently performed his duties as an iceman, with the result that he was injured. Said conduct of plaintiff, as aforesaid, was the sole cause, and the sole proximate cause of the alleged accident, injuries, and damages, if any, alleged by plaintiff.

And For a Fourth, Separate and Independent Answer and Defense to the complaint defendants each severally shows as follows:

## I.

Each defendant here repeats and alleges all of the matters and things set forth in Paragraph I of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. Plaintiff was employed by defendant Pacific Fruit Express Company in the State of California. At all times mentioned in the complaint and herein [9] defendant Pacific Fruit Express Company, in the State of California, had secured the payment of any compensation which might be payable by it to such of its employees injured in the State of California, and in the course of employment in said business, by being qualified as a self-insurer and by having secured from the Director of Industrial Relations of the State of California a certificate of consent to self-insure, which certificate was then and there in full force and effect.

## II.

This Honorable Court has no jurisdiction of the subject-matter of the above entitled action, nor of the parties thereto, and the Industrial Accident Commission of the State of California has sole jurisdiction to determine any and all matters with respect to the accident and injuries referred to in the complaint.

And For a Fifth, Separate and Independent Answer and Defense to the complaint defendants each severally shows as follows:

## I.

Each defendant here repeats and alleges all of



the matters and things set forth in Paragraph I of their fourth answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. After the accident referred to in the complaint, and after the receipt of such injuries as were received by plaintiff, defendant Pacific Fruit Express Company performed all acts and did all things required of an employer, with respect to an injured employee, injured in the course and scope of his employment, in the State of California, as required by the statutes of the State of California, and particularly the Labor Code of the State of California, and tendered to and provided for plaintiff all such medical, surgical, hospital treatment and nursing, supplies and other things and services as was or is reasonably required to cure and/or relieve from the effects of such injuries as plaintiff had received. In addition thereto, after the accident referred to in the complaint, defendant Pacific Fruit Express Company tendered to and paid, and [10] is now paying, to plaintiff, and plaintiff accepted and received, and is now receiving, from said defendant, all pursuant to the Labor Code of the State of California, compensation, and all compensation required to be paid and/or furnished by an employer to an employee injured within the State of California, as required by the statutes of the State of California.

## II.

Each defendant here repeats and alleges all of the matters and things set forth in Paragraph II

of the fourth answer and defense above, and incorporates them herein by reference the same as though fully set forth at length.

Wherefore, defendants Southern Pacific Company and Pacific Fruit Express Company each prays that plaintiff take nothing by his complaint on file herein; that defendants each have judgment for its costs of suit incurred herein and for such other, further and different relief as, the premises considered, is proper.

Dated May 28, 1947.

/s/ A. B. DUNNE,

/s/ DUNNE & DUNNE,

Attorneys for Defendants Southern Pacific Company, and Pacific Fruit Express Company.

Receipt of a copy of the within answer is hereby admitted this 28th day of May, 1947.

RYAN & RYAN,

By DANIEL V. RYAN,  
Attorney for Plaintiff.

[Endorsed]: Filed May 28, 1947.

[11]

District Court of the United States, Northern  
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 30th day of June, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

ORDER GRANTING MOTION TO COMPEL  
REPLY TO DEFENSES

This case came on regularly this day to be set for trial and for hearing on motion to compel reply to defenses. On stipulation of Messrs. Mills and Blanchard, attorneys herein, it is Ordered that said motion be granted and that plaintiff be allowed ten days to make reply. Further Ordered that trial be set for October 9, 1947 (Jury). [17]

[Title of District Court and Cause.]

LIST OF AMOUNTS RECEIVED BY PLAINTIFF TO DATE FROM PACIFIC FRUIT EXPRESS COMPANY UNDER THE CALIFORNIA STATE INDUSTRIAL ACCIDENT COMMISSION.

On June 30, 1947 defendants herein argued their motion to compel plaintiff to reply to defendants' fourth and fifth defense in their answer. The above-entitled Court granted said motion only in the following respect. It required plaintiff only to state what amount he has received to date under the provisions of the California State Industrial Accident Commission.

Plaintiff has received from the Pacific Fruit Express Company to date, under the mistaken impression of Pacific Fruit Express Company that the Labor Code of the State of California has jurisdiction herein, the following sums: [18]

6-21-46	\$ 4.29
7-10-46	64.29
7-17-46	64.29
9-6-46	68.57
9-6-46	64.29
9-10-46	68.57
9-20-46	64.29
10-10-46	64.29
10-24-46	64.29
11-7-46	68.57
11-21-46	64.29

12-4-46	64.29
12-23-46	64.29
2-3-47	68.57
2-6-47	64.29
2-6-47	68.57
2-27-47	64.29
3-11-47	55.71
3-24-47	64.29
4-8-47	68.57
4-30-47	64.29
5-15-47	64.29
5-28-47	64.29
6-11-47	68.57

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Total amount received \$1504.34

Pursuant to the order of the above-entitled Court made on June 30, 1947 requiring plaintiff merely to list the sums he has received to date, plaintiff does not hereby answer paragraphs four or five other than in said respect.

Dated July 2, 1947.

RYAN & RYAN,

By /s/ DANIEL V. RYAN,  
Attorneys for Plaintiff.

[Endorsed]: Filed July 9, 1947.

[19]

[Title of District Court and Cause.]

ADDITIONAL INTERROGATORIES  
TO DEFENDANTS

To defendants above named, and each of them, and to Messrs. Dunne & Dunne, their attorneys:

You, and each of you, are hereby required, by any officer or agent, to answer in writing the following interrogatories within fifteen (15) days after delivery to you of said interrogatories, pursuant to Rule 33 of the Federal Rules of Civil Procedure. Each of the following interrogatories shall apply to each of the defendants and shall be answered separately and fully in writing under oath, and signed by the person or persons making them.

1. Is it not a fact that the Pacific Fruit Express Company icing yard at Bakersfield, California is leased to it by Southern Pacific Company or Southern Pacific Railroad Company?

2. What percentage of iced refrigerator cars on leaving the Pacific Fruit Express Company icing yard at Bakersfield make the initial movement by rail on the tracks of the Southern Pacific Company?

3. What percentage of iced refrigerator cars on leaving the Pacific Fruit Express Company icing yard at Bakersfield make the initial movement by engines under the control and management of the Southern Pacific Company?

4. Is it not a fact that the icing service rendered by the Pacific Fruit Express Company under its Protective Service Contract of July 1, 1942 be-

tween it and Southern Pacific Company and Union Pacific Railroad Company applies only to the Southern Pacific Company in regard to the servicing under said contract by the Pacific Fruit Express Company at its icing yard at Bakersfield, California on June 7, 1946 at the time of the accident to plaintiff herein? [29]

Dated October 7, 1947.

RYAN & RYAN,

By DANIEL V. RYAN,

Receipt of Service of the within Additional Interrogatories to Defendants is hereby admitted this 7th day of October, 1947.

DUNNE & DUNNE.

[30]

[Endorsed]: Filed Oct. 8, 1947.

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[Title of District Court and Cause.]

### STIPULATION AND ORDER

The parties to the above entitled action, by their respective attorneys, hereby stipulate as follows:

1. Upon the making and filing of this stipulation the Court may make its Order approving the same.

2. Heretofore the plaintiff served upon defendants certain interrogatories, objections were made

to certain of said interrogatories and certain proceedings were had thereon and on pre-trial conference. Attached hereto are two verified narrative statements, one verified by an officer of Pacific Fruit Express Company and one verified by an officer of Southern Pacific Company. Said narrative statements, together with this stipulation, shall be deemed answers by the defendants to the interrogatories heretofore [31] served and filed by plaintiff, shall be deemed a sufficient answer to said interrogatories and satisfy the obligation of defendants to make answer to interrogatories and without regard to the manner of verification of the attached narrative statements, said statements and this stipulation shall stand as answers to the said interrogatories, as aforesaid, without regard to whether said interrogatories were directed to one or the other of said defendants or to both of said defendants.

3. Certain interrogatories were directed to defendants as to aspects of their respective businesses and the nature of the work of the plaintiff herein. These interrogatories need not be answered in view of the following:

In respect of the issue of applicability of the Federal Employers' Liability Act and whether this action can be maintained under that Act, the parties hereto agree: Plaintiff received a salary from the Pacific Fruit Express Company.

Plaintiff contends that he is an employee under the terms of the Federal Employees' Liability Act of both the defendants, Pacific Fruit Express Com-



pany and the Southern Pacific Company, by virtue of an agency contract (the contract here referred to by plaintiff is the contract attached hereto as more fully appears below) between the Pacific Fruit Express Company and the Southern Pacific Company under the theory that the Pacific Fruit Express Company was acting as agent of the Southern Pacific Company in the icing and moving of cars, being done at the time of plaintiff's injury and because of the measure of control and other indicia creating a relationship of master and servant between the Southern Pacific Company, as master, and the Pacific Fruit Express Company, as servant.

Defendants do not concede but to the contrary deny and resist plaintiff's position, claim and theory. The contract [32] referred to is attached hereto (by attachment to the attached "Narrative Statement Submitted by Pacific Fruit Express Company") for perusal by the Court. If the Federal Employers' Liability Act applied to Pacific Fruit Express Company at the time plaintiff was injured and if Pacific Fruit Express Company was an employer within that Act, then plaintiff was such an employee of Pacific Fruit Express Company, and plaintiff's work and duties were of such nature, that he was an employee of Pacific Fruit Express Company within the meaning of that Act and was an employee of Pacific Fruit Express Company to whom that Act applied, that is to say, if otherwise the Federal Employers' Liability Act applied to Pacific Fruit Express Company, then

the Pacific Fruit Express Company and plaintiff were engaged in interstate commerce within the meaning of that Act. In this regard the issue is whether by virtue of the said attached contract the Federal Employers' Liability Act applied to Pacific Fruit Express Company and whether it was a common carrier by railroad and defendants, and each of them, reserve this question and as to this no stipulation is made and this is in issue. If the Federal Employers' Liability Act applied to Pacific Fruit Express Company and it was a common carrier by railroad within the meaning of the Federal Employers' Liability Act this section is properly brought under that Act and the other issues tendered by the complaint are open for decision but if Pacific Fruit Express Company was not such a common carrier by railroad this action is not properly brought.

4. The issue of application of the Federal Employers' Liability Act (that is the issue referred to and reserved in paragraph 3 hereof) shall be submitted to the Court for decision on pre-trial conference, on the pleadings, this stipulation and the attached statements of fact (subject to the reservation of [33] objections as stated in paragraph 5 below) for disposition by the Court. If the Court determines that the Act does apply then the cause shall be set down for trial and tried on the issues made by the pleadings and if the Court determines that the Act does not apply it may make appropriate order and judgment disposing of the case, plaintiff reserving objection and excep-

tion if the Court holds that the Act does not apply and judgment, accordingly, is entered for defendants, and defendants, and each of them, reserving objection and exception if the Court holds that the Act does apply.

5. Each of the parties hereto makes and reserves to each matter of fact stipulated to and to each matter stated in the attached narrative statements the objection that the same is irrelevant, immaterial and is not within any issues of the case, and is not preliminary to or foundation for any matter which is competent, relevant or material or within any issue of the case. In this regard the reservation of objection is to the substance of the matter stated but it is agreed that there is no objection to the foundation or form of the showing and that if otherwise the matter is competent, relevant and material it is deemed that the same has been proved by appropriate documentary evidence or a witness competent and qualified to testify.

RYAN & RYAN,

By /s/ DANIEL V. RYAN,  
Attorneys for Plaintiff.

/s/ A. B. DUNNE,

/s/ DUNNE & DUNNE,  
Attorneys for Defendants. [34]

### ORDER

Good cause appearing therefore, the foregoing stipulation is approved and made a part of this

order and this order shall stand as an order in respect of issues and showing on pre-trial conference and the issue submitted to the Court for decision on pre-trial conferences shall stand submitted on memoranda as heretofore ordered by the Court.

Done in Open Court, this 10th day of November, 1947.

/s/ LOUIS E. GOODMAN,  
Judge, U. S. District Court. [35]

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[Title of District Court and Cause.]

NARRATIVE STATEMENT SUBMITTED  
BY SOUTHERN PACIFIC COMPANY

1. The statements herein made, unless otherwise restricted, are made as of all times pertinent in the above entitled action. Pacific Fruit Express Company, a Utah corporation, defendant in the above entitled action, is herein referred to as PFE. SP as herein used refers to Southern Pacific Company and at all times prior to September 30, 1947, refers to the Kentucky corporation by that name and as of all times on and after September 30, 1947 refers to the Delaware corporation by that name, successor to the Kentucky corporation. UP as herein used refers to Union Pacific Railroad Company, a corporation.

2. SP and UP each was, as to some of its business and activities, a common carrier by railroad engaged in interstate [36] commerce and subject

to the Interstate Commerce Act, its amendments, Acts supplementary thereto and Federal Statutes in pari materia therewith and in pari materia with the Federal Employers' Liability Act, and each, as such common carrier by railroad, was subject to the jurisdiction of the Interstate Commerce Commission. SP and UP had no common officers or directors. SP owned none of the capital stock of UP. UP was not the owner or holder of record of any of the capital stock of SP. If UP had any beneficial interest in any of the capital stock of SP standing of record in any other name the amount of such stock was less than 4,000 shares and less than 1/10 of 1% of the issued and outstanding capital stock of SP.

3. Before the commencement of business by PFE, SP and UP were common carriers by railroad. Before PFE commenced business refrigerator car service, "protective service" and service to users of railroads of the sort for which the facilities and services of PFE were used after commencement of business by it, were made available by SP and UP to railroad users by being furnished by third persons acting under contracts between such third persons and SP and UP and neither before nor after the commencement of business by PFE did SP or UP undertake to provide, or provide, any such service or facilities except by and through such third persons and/or PFE. The facilities and services so provided by such third persons before the commencement of business by PFE were essentially those furnished by PFE after its

organization and after it began business and hereinafter more particularly described.

4. The ice being handled by plaintiff and his fellow employees of PFE at Bakersfield, California, on or about June 7, 1946, was transported and hauled to the yard at Bakersfield, California, by an engine operated by SP. [37]

5. No employees of SP were employed or worked at the PFE icing dock, or installations, or plant, or property at Bakersfield, California, except enginemen and switchmen, members of SP yard switching crews, who were full time SP employees and members of SP yard or switching crews switching cars in or out of tracks at said PFE plant, and elsewhere, in and about Bakersfield, California, in the normal course of common carrier railroad service of SP or in the course of a switching move of refrigerator cars or other cars used in the railroad "protective service" of Atchison, Topeka & Santa Fe Railway Company or Sunset Railway, common carriers by railroad. There were no employees of SP at Bakersfield, California, engaged in the business of PFE or performing any of its services or acting as its agent.

6. Hospitalization and medical treatment for injured employees of PFE injured at Bakersfield and other places in California, and elsewhere, was available in the following way and the following circumstances:

(a) There had been established hospital plans, respectively, for employees of SP and UP. The SP plan was one of medical and hospital treatment

and service for SP employees (and others as herein stated). Said plan was managed and operated by a Board of thirteen members, seven of whom were selected by employee participants in the plan and six of whom were appointed by SP. Under said plan there was operated a general hospital and medical, dental and nursing treatment, attention and service was provided. The operations of said plan were conducted with segregated funds and without any liability on the part of SP for any deficit in the operation of the plan or to make any payments for any treatment, attention or service except as it made payment for services rendered in the case of on-duty injuries to SP employees, or to others [38] to whom it was legally obligated to provide such treatment, attention or service.

(b) Both the SP plan and the UP plan were available to employees of PFE as employee participants. Employees of PFE were participants in one or the other of said plans, in the SP plan or the UP plan, depending upon whether the employee of PFE worked on or near the line of SP or on or near the line of UP. This was under arrangement between PFE and the operators of said plans.

(c) The said arrangements between PFE and the operators of said plans were that all employees of PFE who were eligible for either of said plans were required to be an employee participant in one or the other of said plans depending on the place of employment of said PFE employee, as above stated. In the case of PFE employees, contribution from eligible employees to the appropri-

ate plan was compulsory and was made by deduction by PFE from the employee's salary check. Plaintiff was such an employee of PFE and on account of his eligibility for and participation in the SP plan, \$2.75 per month was deducted by PFE from his pay.

(d) Under the SP plan participants in the plan (Plaintiff included) were entitled to medical, dental, nursing, hospital and similar attention and service required for any illness or disease (mental illness and venereal diseases excepted) and injuries (whether received on duty or off duty) but in the case of PFE employees (the plaintiff included) their contributions were used only for illness, or for injury not connected with the performance of duty as a PFE employee and in the case of all injuries to PFE employees arising out of and in the course of their employment PFE paid to the SP plan the actual cost of care and treatment furnished where PFE was legally liable for such care and treatment.

H. J. WALKER.

A. B. DUNNE,

DUNNE & DUNNE,

Attorneys for Defendant Southern Pacific Company.

[39]



State of California,  
City and County of San Francisco—ss.

H. J. Walker, being first duly sworn, deposes and says:

I am an Officer, to-wit, the Executive-Assistant, of Southern Pacific Company, a defendant in the above entitled action, and as such make this affidavit and verification. For the purpose of making this verification and affidavit I have examined the records of Southern Pacific Company, reports and orders of the Interstate Commerce Commission and in respect of other matters where I have no personal knowledge I made inquiry of persons believed by me to know the facts and this affidavit and verification is made by me based on the information so acquired. I have read the foregoing statement on behalf of Southern Pacific Company and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

H. J. WALKER.

Subscribed and sworn to before me this 7th day of November, 1947.

(Seal) KATHRYN E. STONE,  
Notary Public in and for the City and County of  
San Francisco, State of California. !40]

[Title of District Court and Cause.]

NARRATIVE STATEMENT SUBMITTED BY  
PACIFIC FRUIT EXPRESS COMPANY

I.

1. The statements herein made, unless otherwise restricted, are made as of all times pertinent in the above entitled action. Pacific Fruit Express Company, a Utah corporation, defendant in the above entitled action, is herein referred to as PFE. SP as herein used refers to Southern Pacific Company and at all times prior to September 30, 1947, refers to the Kentucky corporation by that name and as of all times on and after September 30, 1947, refers to the Delaware corporation by that name, successor to the Kentucky corporation. UP as herein used refers to Union Pacific Railroad Company, a corporation.

2. The statements of paragraphs 5 and 6 of the narrative statement submitted by Southern Pacific Company are adopted. [41]

3. PFE was and is a Utah corporation organized in 1906. It qualified to do business in California December 6, 1906, began the doing of its business in California October 1, 1907, and ever since has been duly licensed to do business and doing business in California.

The business conducted by PFE since the commencement of business by it was substantially its business hereinafter described.

4. PFE, prior to the commencement of business by it, acquired some of the facilities required for

that business and used in that business, as herein described, from persons who theretofore had provided such service to SP and UP and among the facilities so acquired were icing plants and car building and repair shops. Theretofore and thereafter it acquired other facilities from other sources. PFE did not acquire any of its properties or facilities from SP or UP except as by purchase or lease it acquired real property for ice plants or car shops near the lines of either of said railroads or, under contract, had one or the other of said railroads do track or other construction work for it.

5. After PFE began the commencement of business SP and UP obtained services and facilities of the sort provided by PFE primarily from PFE, under contract with it, except that, as hereinafter more fully appears, both of said railroads availed themselves of empty refrigerator cars which might be on their respective lines from time to time for loading and carrying perishables and other commodities properly moving in such type of cars, without regard to who owned said cars and many of said cars were not PFE cars.

6. At the time PFE was organized its authorized stock was \$100 par value common stock and all of said stock issued was issued to, and fully paid for by, UP and SP in equal proportions [42] and ever since, and at all times herein mentioned, UP has owned one-half of the issued and outstanding capital stock of PFE and SP has owned the other one-half of the issued and outstanding capital stock of PFE and all of said issued stock was fully paid up.

7. On June 7, 1946, the date of the accident herein involved, there was issued and outstanding 240,000 shares of the common capital stock of PFE, each share being of a par value of \$100, and of said 240,000 shares SP owned 120,000 shares and UP owned 120,000 shares.

8. In June 1946, the following were officers and directors of PFE elected as directors by vote of the stockholders of PFE and had railroad connections as hereinafter indicated, to-wit:

R. E. Plummer, President and a Director of PFE, was Controller of SP at New York.

E. B. Conrad, Vice President and a Director of PFE, was UP Assistant Controller at New York.

E. M. Kindler, a Director of PFE, was elected by vote of UP stock and is believed to have some connection with UP, the exact nature of the connection being unknown to the officer verifying this statement.

Darwin P. Kingsley, a Director of PFE, was elected by vote of UP stock and is believed to have some connection with UP, the exact nature of the connection being unknown to the officer verifying this statement.

Charles L. Minor, a Director of PFE, was one of the General Attorneys of SP located in New York.

John B. Reid, a Director of PFE, was Assistant to SP Vice President in Charge of Finance in New York.

9. In addition to the foregoing Officers and Directors, in June, 1946, PFE had the following prin-

principal officers who had no railroad connection nor any connection with UP or SP and who devoted their full time in the business of PFE: [43]

K. V. Plummer, Vice President and General Manager and principal operating officer of PFE in charge of all actual business and operations of PFE.

C. Ahern and O. I. Larsen, Assistant General Managers, in charge of allocation and assignment of cars to railroads.

Walter H. Rogers, Auditor in charge of Finance and Accounts.

L. E. Cartmill, General Superintendent of Car engineering, construction and maintenance, in charge of the car shops and repair shops.

L. Etzel, General Superintendent of Refrigeration, San Francisco, in charge of all ice plants, and icing and protective service at ice plants.

Fred Garrigues, Personnel Manager.

10. The PFE business and operations, hereinafter more particularly referred to, conducted and carried on by it were conducted, directed, managed and carried on for it by (a) its executive officials and (b) its employees as follows: General foreman, shop foremen, carpenters, carmen, carmen helpers, mechanics, mechanic's helpers, machinists, car laborers, car painters, derrick operators, welders, store clerks, store deliverymen, store laborers, icemen (including plaintiff), ice-pullers, and other men employed in ice manufacturing plants, ice plant managers, icing dock foremen, inspectors and the like. Said employees were all full time employees of

PFE and none of them were joint employees of PFE and any other firm, person or corporation. Most (if not all) employees in class (b) above belonged to labor unions (sometimes referred to as Brotherhoods) and PFE had collective bargaining agreements with said unions as the collective bargaining agents of such employees and as to the employees of PFE said collective bargaining contracts were solely between PFE on the one hand and such collective bargaining agent on the other hand and in respect of PFE business and employees. Said employees [44] in class (b) did their work under the control, supervision and direction of PFE officers and supervisory employees. None of said employees of PFE were employed under or governed by any collective bargaining agreement or contract to which any railroad or SP or UP was a party. Seniority of the employees of PFE was solely by reason of employment by PFE, prior or later employment of such employee by any railroad or SP or UP had no relation to any seniority with PFE and there was no cross seniority between employees of PFE and employees of any railroad or SP or UP.

## II.

1. (a) PFE was one of a number of corporations in the United States engaged in the same line of business. This business was that hereinafter described, by description of the business of PFE, conducted as hereinafter described. Among such other corporations were American Refrigerator Transit Company, Burlington Refrigerator Express Com-

pany, Western Fruit Express Company, Fruit Growers Express Company, and Merchants Dispatch, Inc. All of said corporations are hereinafter sometimes referred to as car companies.

(b) Many common carriers by railroad in the United States provided common carrier by railroad service for the transportation of commodities (usually referred to as "perishables") which were subject to being adversely affected by heat or by cold or by changes in temperature or by natural deterioration unless kept cold, and in connection with such transportation undertook to make available to those interested in the transportation of such perishables a service to protect such perishables against such adverse effect or natural deterioration by making available "protective service" SP and UP were among such common carriers by railroad. Said protective service was made available by making [45] available specially designed and built cars of various types and making available servicing of said cars so as to regulate the temperature of the interior of said cars. The most common type of said car was the standard refrigerator car and for that reason all of said specially designed and built cars are commonly referred to and are all herein referred to, as reefers. After April 15, 1946, such protective service was furnished by more than four hundred common carriers by railroad in the United States (including SP and UP) under the provisions of "Perishable Protective Tariff No. 14" and the supplements thereto (Interstate Commerce Commission No. 25 and

California Public Utilities Commission No. 16) in which said common carriers by railroad (SP and UP included) were participating carriers. Said tariff and its appropriate supplements were duly posted, published and filed, agreeably to the laws of the United States and of the State of California in such cases made and provided and were in force and effect at all times after April 15, 1946. Said tariff specified the various types of protective service available and the method by which shippers could avail themselves of such service. In and by said tariff, it was expressly provided that the carriers, participating in said tariff reserve the right to furnish reefers necessary for the services specified in said tariff "through their own ownership or by arrangement with non-shipper private car lines" or "by arrangement through the Association of American Railroads with shipper-owned car lines or shipper car-owners".

(c) Many common carriers by railroad in the United States and many of such carriers parties to said Perishable Protective Tariff No. 14 and its supplements, including SP and UP, providing reefer service and protective service owned no reefers and obtained and provided the same for common carrier railroad service and [46] obtained and provided protective service and the servicing of reefers by arrangement with various car companies in substantially the manner hereinafter described as to PFE.

2. The business and activity conducted by PFE by and through its employees as above stated in paragraph 10 of Part I was as follows:



(a) "Car hire" business, i. e., owning and maintaining reefers and furnishing them to railroads for use in the railroad service as hereinafter stated.

(b) Owning and operating car shops and plants for the maintenance, repair and rebuilding of reefers and heater equipment, as hereinafter stated.

(c) Owning and operating ice plants for the manufacture of ice and manufacturing ice.

(d) Servicing reefers in use by common carriers by railroad by providing to common carriers by railroad "protective [47] service" i. e., heater service and ice and icing and refrigerator service, as hereinafter stated. The heater service was only a small proportion of the business of PFE, the large part of its protective service being icing.

(e) The PFE business and activities herein described were conducted and directed by its employees as stated in paragraph 10 of Part I above, its income was payments received (1) from common carriers by railroad for car hire of cars, (2) from common carriers by railroad for protective service (see below) and (3) from car companies for repair of cars of other car companies. As of June 1946 the net worth of PFE was more than \$40,000,000. From its own funds, PFE paid all operating expenses including wages of employees, cost of cars purchased, cost of supplies and materials, cost of plants, cost of power and public utility services, insurance, taxes and, where property was leased by it from other persons (railroads included), rent.

3. PFE conducted its "car hire" business in all

parts of the United States and on the lines of all railroads in the United States parties to said Perishable Protective Tariff No. 14 as hereinafter more fully appears. PFE conducted its other business in the States of Oregon, Washington, California, Idaho, Utah, Nevada, Arizona, Texas, Louisiana, Colorado, Kansas, Wyoming, Nebraska and Iowa. Its car shops were located at Nampa, Idaho; Roseville, California; Los Angeles, California; Colton, California; Pocatello, Idaho and Tucson, Arizona.

4. The PFE "car hire" business carried on and conducted by it was conducted by it as follows:

(a) PFE acquired, owned, maintained and furnished reefers to common carriers by railroad for use in railroad [48] service. As of June 1946 the number of such reefers was more than 35,000. It did not move, or control the handling of, the reefers so furnished and did not in any way move any of its reefers or any other reefers except as it moved reefers that were out of service and in its shops for repair or rebuilding, about the shops and except as by the use of non-locomotive power its employees moved reefers at icing docks or loading platforms for the purpose of facilitating its own work of handling ice and providing protective service by servicing reefers. The reefers so furnished whether loaded or empty were freely interchanged between all railroads referred to in paragraph 3 of this Part II and moved over the lines of all said railroads.

(b) On account of furnishing reefers, as afore-

said and except as stated below, PFE received \$.02\* per car for each mile that each standard reefer moved (loaded or empty) over the line of any railroad (SP and UP included), said amount being paid to PFE by each railroad over whose line the car moved on the basis of \$.02\* for each mile moved (loaded or empty) on the line of such railroad. This sum was paid for car hire and did not cover any protective service. For example, said car hire was paid as follows: If a standard PFE reefer moved under revenue load (either with or without protective service) from San Francisco, California to Boston, Massachusetts by SP, UP, C&NW, NYC, and B&A (each group of initials representing a separate common carrier by railroad), each of said five railroads paid to PFE \$.02\* for each mile said reefer moved over the line of that railroad and if said car, after unloading at Boston, Massachusetts, was then returned empty to Los Angeles, California, via NY NH&H, Penn R. Co., and AT&SF (each group of initials representing a separate common carrier by railroad) the last [49] three named railroads paid PFE \$.02\* per mile for each mile said reefer mover over the line of that railroad, although none of said three last mentioned carriers hauled said reefer in revenue service. Likewise SP and UP respectively paid the owning car company (whether it was PFE or any other car company) \$.02\* for each mile each

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\* Prior to July 1, 1946. On and after July 1, 1946 \$.025 per mile.

standard reefer owned by such company moved, loaded or empty, over the line of SP or UP respectively. This system of paying car hire for reefers on a mileage basis was uniform throughout the United States, applied to all car companies (PFE included) and all common carriers by railroad. The car hire, as aforesaid, was paid to the respective car companies by the said common carriers by railroad respectively and no part of it was paid by any shipper or other customer of any common carrier by railroad or other person liable for railroad services furnished, and, to the contrary, the only charge paid by the shipper or other customer of common carriers by railroad or other person liable for railroad services furnished, for use of reefers was unsegregated and included in the line haul tariff charge of the respective common carriers by railroad.

(c) There were the following minor exceptions to the matter stated in sub-paragraph (b) just above: On a comparatively small number of special type cars the rate per mile was different but was otherwise paid and applied as stated in said paragraph and on a mileage basis, but this exception applied only to certain car companies other than PFE and in the case of PFE all of its car hire was applied and paid as above stated. Also, some car companies (PFE not included) for a certain comparatively small number of special cars for special use had a minimum monthly guarantee arrangement. There was a further unimportant exception in that a few reefers were rented by car

companies to [50] railroads or shippers on a monthly basis. The exceptions stated in this subparagraph (c) were minor and special exceptions, unimportant in the general conduct of the business of the car companies, insufficient to change its general character, as herein and elsewhere **stated and stated here only for the sake of accuracy.**

(d) In actual practice all common carriers by railroad upon whose lines there was any empty PFE reefer could, and did, load and use such reefer as originating carriers and in their own common carrier by railroad service and so used empty reefers on their respective lines without regard to the car company which was the owner thereof, and as the business and convenience dictated. This practice was followed by SP and UP and in their own services as common carriers by railroad they loaded and used any empty reefer on their respective lines in their service and as originating carriers and so used the reefers of all car companies in the same manner they used PFE reefers.

(e) PFE owned no cars other than reefers and owned no rail motive power except one plant locomotive used at its Roseville car shop for shop switching purposes and for no other purpose. PFE neither owned nor operated any railroad tracks except (1) shop tracks used by it exclusively in the operation of car shops and (2) plant unloading tracks at icing docks and icing plants where the unloading track was its track held by it as owner or under lease and used only for delivery to PFE

of ice which was brought to such plant or dock for use in PFE icing service.

(f) PFE did no railroading and performed no railroad operations (except as its business herein described may have been railroading or railroad operations), movement of reefers to and [51] from its icing plants and icing docks was by switching moves and such switching moves were always performed by some common carrier by railroad, usually SP or UP.

5. The PFE business of conducting and operating car repair and rebuilding shops was conducted by it as follows:

(a) PFE owned all the shop facilities including buildings and tracks and was owner of the land utilized for the same, or held such land under lease on which it paid rent and taxes, and in said shops conducted the business of maintaining, repairing and rebuilding (and in rare instances building new) reefers by use of its own forces, materials, etc., and at its own expense.

(b) In said shops PFE rebuilt and repaired its own reefers.

(c) In said shops PFE repaired reefers of other car companies when the same required repair and the reefer requiring repair was on the lines of SP, UP, Western Pacific Railroad Company or any railroad so located that a PFE shop could be reached over the line of such railroad and without making use of the services of any other railroad (except switching service in some instances) and said repairs were paid for by the owner of the reefer.

6. The PFE business of operating ice plants and manufacturing ice was conducted by it as follows:

(a) The ice plants were located near the facilities of common carriers by railroad, the ice manufactured by PFE was manufactured by the usual and customary methods and such ice was normally not sold commercially but was used in the PFE icing service or furnished to the SP or UP for railroad purposes.

(b) In certain instances it was necessary for PFE [52] to buy ice commercially from commercial manufacturers of ice (1) in certain instances where its own ice making facilities did not have sufficient capacities to meet periodic demands made upon it in carrying on its icing service business and (2) in some instances PFE had icing docks located at points where it had no ice manufacturing plant and it was necessary for it, at such points, as at Phoenix, Arizona; Brawley and El Centro, California, to buy ice from commercial manufacturers or, in some instances, where it had a surplus at other points, to bring in such ice.

7. The PFE business of providing "protective service" consisted of providing services of three general sorts (1) heater service, (2) ventilator service and (3) refrigeration service, i. e., supplying ice and (3) refrigeration service, i. e., supplying conducted by it was conducted as follows:

(a) The service was furnished to common carriers by railroad (SP and UP included) which reached PFE plants by their own lines (including

railroads which could reach said plants by their own lines with no service from any other railroad except switching service). For example, such service was furnished to Atchison, Topeka & Santa Fe Railway Company at Bakersfield, California. The lines of said railroad went into Bakersfield and the PFE icing docks at Bakersfield were reached by Atchison, Topeka & Santa Fe Railway Company by use of its own lines and switching service of SP at Bakersfield. So protective service was furnished to Western Pacific Railroad Company at Carlin, Nevada and Modesto, California and for various railroads at Salt Lake City, Utah and other railroads throughout the area in which PFE did business as hereinabove stated.

(b) Such protective service was provided by PFE for all [53] reefers, whether PFE reefers or reefers of other car companies, so long as the same were presented for servicing by a common carrier by railroad.

(c) SP and UP made available to users of their railroad facilities and service all of the types of protective service specified in Perishable Protective Tariff No. 14 and its supplements. Among the services so provided were the following:

- (1) Standard refrigeration;
- (2) Half-stage refrigeration;
- (3) Top or body icing (that is, ice placed in the body of the car as distinguished from the bunkers of the car);
- (4) Shipper's protective service (initial icing or heat provided by shipper);



(5) Shipper's specified service (protection against frost, freezing or artificial overheating supplied by use of heaters furnished, installed, and serviced by carriers, or for carriers, as directed by shipper);

(7) Carrier's protective service;

(8) Ventilation service (various types);

(9) Protective service against cold.

Under said tariff the shipper was required to specify to the carrier, in writing, the character of the service desired by the shipper. In addition, the shipper by direction in writing to the carrier, had the privilege, under the tariff, of changing the character of service. In addition, under the tariff, the shipper was entitled to specify in writing to the carrier the character of icing desired, whether crushed, coarse or chunk ice, was entitled to specify to the carrier in writing that the car be pre-cooled or pre-iced, in the case of icing was entitled to specify to the carrier in writing the amount of salt, if any, to be used, was entitled to give instructions to the carrier as to re-icing [54] and was entitled to give to the carrier instructions as to the character of ventilation service desired where it was desired. In short there were various types of protective service available under the tariff, the type of service once specified by the shipper could be changed by the shipper, and within each type of service there were variations which the shipper could specify. The shipper was required to give to the carriers orders in writing as to the character of service desired within the various characters of

service permissible under the tariff and the variations of each. In the case of SP and UP, (where the protective service made available by them under the tariff was furnished by PFE), SP or UP, on receipt of the shipper's orders as to the character of service desired, transmitted these by orders to PFE and PFE then complied with said orders and furnished the character of service ordered. In the performance of protective service no other orders were given by SP or UP to PFE except such orders, such orders were only as to the character of service ordered by the shipper, such orders were only as to the result to be furnished to the shipper and neither SP nor UP gave PFE orders as to how PFE should accomplish the result of providing the type of service ordered by the shipper. The same procedure was followed by SP and UP where shipment originated on the lines of SP or UP and while the shipment was in course of transit the shipper gave to SP or UP an order to change the character of protective service. If the reefer was then no longer on the lines of SP or UP a shipper's order given to SP or UP as originating carrier, was transmitted by it to the railroad or the car company or such other person as would perform the service and follow the shipper's instructions and change the character of service and was transmitted in the same way as hereinabove stated in the case of orders [55] transmitted to PFE. In this regard there was no distinction between the orders for performance of protective service given by SP to PFE in respect of cars on

SP lines and orders given by SP to other railroads, car companies or other third persons in respect of cars originating on SP lines but off SP lines at the time the order was given.

(d) PFE was paid for the protective service provided by it by the common carrier by railroad to whom the service was furnished. In the case of SP and UP it was paid as provided in the contract referred to in sub-paragraph (e) below, copy of which is hereto attached. PFE was not paid anything by any shipper or other person availing himself of reefer or protective service on the line of any common carrier by railroad. To the contrary, such service was paid for by such shipper or such other person, by making payment to the common carrier by railroad at the tariff rates provided in Perishable Protective Tariff No. 14 and its supplements and said payment was made to the railroad presenting the freight bill for line haul service, or by other appropriate common carrier by railroad party to the line haul.

(e) The contract, a copy of which is hereto attached, was the only contract in respect of protective service between PFE and SP and UP. It was approved by the Interstate Commerce Commission, became effective July 22, 1942, and has ever since been in effect. PFE had substantially similar contracts with other railroads.

8. PFE was not party to any railroad or common carrier by railroad or other tariff nor did it have any posted, published or filed tariff with the Interstate Commerce Commission or the Public

Utilities Commission of the State of California or similar body in any State or any other such tariff and made no tariff [56] or other charge to any shipper or other user of facilities of common carriers by railroad and had no business revenue except as hereinabove stated. PFE did not issue any bills of lading or other shipping documents or enter into any other form of agreement with any shipper or other person availing himself of the services of common carriers by railroad. All claims for loss or damage to shipments moving in reefers and/or protective service over the lines of any common carrier by railroad were made to the appropriate common carrier by railroad, handled by such carrier, in proper cases paid by such carrier and no charge on account thereof was passed to PFE directly or indirectly and PFE never assumed any responsibility for or recognized any such claims either to common carriers by railroad, or shippers or other persons, except as responsibility to common carriers by railroad for PFE's own defaults were recognized and except as provided in paragraphs 12 and 13 of the contract, a copy of which is hereto attached, in the case of SP and UP and the common carriers by railroad specified in Appendix A to that contract.

9. The method hereinbefore described of providing reefer service and railroad protective service has been used in the United States for many years and for many years long prior to 1939 and while PFE was conducting its business as aforesaid and the principal car companies providing such service

and operating as PFE operated as herein set out, other than PFE, were:

American Refrigerator Transit Company, whose stock was wholly owned by Missouri Pacific Railroad Company and Wabash Railroad Company;

Burlington Refrigerator Express Company, whose stock was wholly owned by Chicago, Burlington & Quincy Railroad Company;

Western Fruit Express Company, whose stock was wholly owned by Great Northern Railway Company; [57]

Merchants Dispatch, Inc., whose stock was wholly owned (indirectly) by New York Central Railroad Company;

Fruit Growers Express Company, whose stock was owned by nineteen common carriers by railroad;

and said stock owning railroad companies were all major common carriers by railroad engaged in interstate commerce in the United States. During all of said time said facts were well known to the Interstate Commerce Commission and matters of general notoriety in the United States.

10. During all the time herein mentioned PFE has consistently taken and adhered to the position (and now does so) that it was not a common carrier by railroad, was not subject to the Federal Employers' Liability Act and that its employees were not under the Federal Employers' Liability Act and, to the contrary, has consistently taken the position, and acted on the position, in which its employees have acquiesced, that its employees in-

jured in the State of California were all subject to the Workmen's Compensation Act of the State of California (now embodied in the Labor Code of the State of California) and during said times the Industrial Accident Commission of the State of California has made compensation awards to all classes of its employees under said California Statute and PFE has consistently paid compensation and provided medical care and attention under and in pursuance to the terms of said Act to all of its employees injured in the State of California and the same has been accepted by said employees, and at no time has any judgment under the Federal Employers' Liability Act ever been obtained against PFE.

### III.

1. It is not the fact that the PFE icing yard at Bakersfield, California, was leased to it by SP or Southern Pacific [58] Railroad Company but, to the contrary, the icing plant at Bakersfield, California and the land upon which the same was located, were owned by PFE, the icing track was owned by SP and the unloading track (now owned by PFE) was, at the time of the accident referred to in the complaint herein, leased by SP to PFE. All switching in and out of the unloading and icing tracks at Bakersfield was done by SP switch engines and crews, and in this sense all iced reefers leaving the PFE plant at Bakersfield make their initial movement by engines under the control and management of SP but some of said cars (less than 50%) were hauled in their first line movement by

Atchison, Topeka & Santa Fe Railway Company and/or Sunset Railway.

2. It is a fact that the icing service rendered by PFE under its protective service contract of July 1, 1942 between it and SP and UP applied only to SP in regard to the service under said contract by PFE at Bakersfield on June 7, 1946 at the time of the accident to plaintiff herein but it is not true that that was the only icing service rendered by PFE at Bakersfield or that the only icing service rendered by PFE was rendered under said contract, as hereinabove more fully appears.

3. At the time he was injured plaintiff and other PFE employees were engaged in unloading PFE cars and plaintiff was injured as a result of the movement of said cars by plaintiff and other PFE employees. The cars involved, and being so handled at the time plaintiff was injured were PFE reefers Nos. 62693 and 43446. The destination of said reefers on their first line haul after plaintiff was injured is unknown to PFE for the reason that after the completion of the work in which plaintiff and other PFE employees were engaged at the time plaintiff was injured said cars moved onto the lines of Atchison, Topeka & [59] Santa Fe Railway Company at Bakersfield and moved, on their first line haul, to their first destination when loaded with freight and fully iced, over the lines of Atchison, Topeka & Santa Fe Railway Company in its service and the first movement of said cars, after injury to plaintiff, was in the service of Atchison, Topeka & Santa Fe Railway Company.

4. It is not a fact that ice supplied by PFE at Bakersfield, California, was there supplied only to SP but, to the contrary, the same was supplied by PFE to other common carriers by railroad.

5. No ice used by PFE at Bakersfield was manufactured or processed by PFE at Phoenix, Arizona or El Centro or Brawley, California. PFE had an ice making plant at Colton, California, and on rare occasions, and irregularly, ice manufactured and processed at Colton, California was moved to Bakersfield, California. No ice was being so moved at the time plaintiff was injured.

WALTER H. ROGERS.

/s/ A. B. DUNNE,

/s/ DUNNE & DUNNE,

Attorneys for Defendant Pacific Fruit Express  
Company. [60]

State of California,

City and County of San Francisco—ss.

Walter H. Rogers, being first duly sworn, deposes and says:

I am an Officer, to-wit, the Auditor, of Pacific Fruit Express Company, a defendant in the above entitled action, and as such make this affidavit and verification. For the purpose of making this verification and affidavit I have examined the records of Pacific Fruit Express Company, reports and orders of the Interstate Commerce Commission and in respect of other matters where I have no personal knowledge I made inquiry of persons believed by me to know the facts and this affidavit and veri-



fication is made by me based on the information so acquired. I have read the foregoing statement on behalf of Pacific Fruit Express Company and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

WALTER H. ROGERS.

Subscribed and sworn to before me this 31st day of October, 1947.

(Seal) KATHRYN E. STONE,  
Notary Public in and for the City and County of  
San Francisco, State of California. [61]

## PROTECTIVE SERVICE CONTRACT

Between Pacific Fruit Express Company and  
Southern Pacific Company and Union Pacific  
Railroad Company.

Dated July 1, 1942 [62]

## AMENDMENT TO PROTECTIVE SERVICE CONTRACT

Dated July 1, 1942

Pacific Fruit Express Company, Southern Pacific Company and Union Pacific Railroad Company, the parties to Protective Service Contract dated July 1, 1942, hereby mutually agree, subject to the approval of the Interstate Commerce Commission being obtained therefor, that the said Protective Service Contract be amended as follows:

1. Item (4) under Refrigeration Service, set forth in Appendix B to the Protective Service Contract, is hereby amended to read as follows:

(4) Repairs to refrigerating devices. (This item includes cleaning of tanks and drains and around hatchways.)

Per car per trip in which ice is placed in bunkers of cars for shipments when refrigeration service is covered by Section 2 of Perishable Protective Tariff .....\$5.00

2. Item (5) under Refrigeration Service, set forth in Appendix B to the Protective Service Contract, is hereby amended to read as follows:

(5) Repairs of damage caused by top or body ice. (This item includes cleaning occasioned solely by top or body icing.)

Per car per trip in which ice is placed in body of car as follows:

10,000 pounds or less.....	\$ 5.00
Over 10,000 pounds, but not exceeding 15,000	
· pounds .....	7.50
Over 15,000 .....	10.00

3. This amendment shall be effective from July 1, 1942.

In Witness Whereof, the parties hereto have executed this instrument in several counterparts, this 31st day of January, 1945, each an original and each having effect as of July 1, 1942.

**PACIFIC FRUIT EXPRESS  
COMPANY,**

By **K. V. PLUMMER,**  
Vice President and General  
Manager.

Attest  
(Seal)

**ROY G. HILLEBRAND,**  
Assistant Secretary.

**SOUTHERN PACIFIC  
COMPANY,**

By **A. T. MERCIER,**  
President.

Attest  
(Seal)

**H. J. CARROLL,**  
Secretary.

**UNION PACIFIC RAILROAD  
COMPANY,**

By **F. W. CHARSKÉ,**  
Chairman Executive Committee.

Attest  
(Seal)

**E. G. SMITH,**  
Secretary.

I. C. C. order of October 10, 1945, approved the the amendment to Item (4) of Appendix B without limitation, and approved the amendment to Item (5) of Appendix B for a limited period from July 1, 1942, to December 31, 1946, with permission to present the matter for further approval by the Commission prior to the latter date. [64]

An Agreement dated and effective July 1, 1942, by and between Pacific Fruit Express Company, a corporation of the State of Utah, herein called the "Car Line," party of the first part; Southern Pacific Company, a corporation of the State of Kentucky, party of the second part; and Union Pacific Railroad Company, a corporation of the State of Utah, party of the third part.

Southern Pacific Company acts herein for and in behalf of itself and of the railroad companies owned, operated or controlled by it, which are named in Part I of Appendix A hereto or which are hereafter included by agreement of all of the parties hereto. Southern Pacific Company and the companies for which it acts as aforesaid are herein collective called "Southern System."

Union Pacific Railroad Company acts herein for and in behalf of itself and of the railroad companies owned, operated or controlled by it, which are named in Part II of Appendix A hereto or which are hereafter included by agreement of all of the parties hereto. Union Pacific Railroad Company and the companies for which it acts as aforesaid are herein collectively called "Union System."

All of said railroad companies of both Southern

System and Union System are herein collectively called the "railroads."

The rights and obligations of the Railroads under this agreement shall be deemed several rights and obligations of each of the aforesaid Systems, and not joint rights and obligations of the Railroads.

This contract relates to the protective services against heat or cold rendered by the Car Line to property transported by the Railroads.

1. The Car Line shall undertake and perform, as the agent of the Railroads, all of the services necessary to the effective refrigeration, and/or heating of [65] commodities requiring such service transported in cars owned by Car Line or cars of other ownership when under Car Line control and shall supply the necessary ice and other means of refrigeration and/or heating. The Car Line shall perform such services when the said commodities are being transported by the Railroads and shall perform such services to the extent that the Railroads are obligated therefor for such commodities moving in cars so owned or controlled when they are in the possession of other carriers.

2. The Car Line agrees, as agent for the Railroads, to furnish ice necessary for the protection of all perishable freight handled by the Railroads, and the requisite heating appliances and fuel (when the car is moving under heater service), whether in equipment belonging to the Car Line, to the Railroads, or to other lines, and to place and maintain the same in the cars for such protection.

3. The Car Line shall receive for its services performed under this contract (except for services referred to in subsequent sections of this contract and for which the measure of compensation is expressly stated) compensation as set forth in Appendix B hereto. Such compensation shall be paid to it by the system to which the tariff revenue accrues for the services performed.

4. The Car Line further agrees to furnish ice, when necessary, to peddler, or pick-up cars transporting L.C.L. shipments of perishable freight, such ice to be furnished in the tanks of such cars and a proper charge to the Railroads is to be made therefor; also to furnish ice to the Railroads for other railroad purposes on proper requisition of the party in charge at any point where the Car Line has a supply of ice, provided the Car Line supply of ice on hand at the time is sufficient [66] for its own needs and those of the railroads. The Railroads agree to pay, and the Car Line agrees to receive, for ice furnished as specified in this section, an amount equal to the cost of such ice. In case of shortage of ice at any point the passenger trains of the Railroads shall always have preference in being supplied with ice.

Car Line also agrees in like manner to furnish to peddler or pick-up cars transporting L.C.L. shipments of perishable freight, upon the request of the Railroads (or any of them), the requisite heating appliances and fuel, the said heating appliances and fuel to be placed in the cars using the same, and a proper charge made against the Rail-

roads therefor; also to furnish heating appliances and fuel to the Railroads for other railroad purposes, on proper requisition of the party in charge, at any point where the Car Line has a supply of such heating appliances and fuel, provided the Car Line supply on hand at the time is sufficient for its own needs and those of the Railroads. A proper charge is to be made by the Car Line against the Railroads therefor.

5. The Railroads shall provide the Car Line with ice at their icing stations or houses, whenever required, at cost; provided their supply of ice on hand at the time is sufficient for their own needs and those of the Car Line.

6. Whenever and wherever the Railroads furnish ice from their own supply to refrigerator cars for the Car Line, the charge to the Car Line therefor in the tanks of the cars shall be cost.

7. The Car Line will make studies concerning charges, rules and regulations for protective service against heat or cold to be published in tariffs of the Railroads, and, upon request of the Railroads, will confer in regard thereto, and perform such other services as may be [67] required by the Railroads in regard to the preparation and publication of such tariffs.

8. The services called for by this contract shall be performed by the Car Line without unjust discrimination against or undue favor to the Southern System, the Union System, or any shipper. In the performance of such service, the orders of the System on whose tracks loading, unloading or

movement takes place shall be promptly and strictly obeyed by the Car Line.

9. Agents and employees of the Railroads and agents and employees of the Car Line shall cooperate in every reasonable and proper way to promote the mutual interests of the parties hereto with respect to business covered by this agreement.

Reports and other useful information concerning the business covered by this agreement shall be interchanged when for mutual advantage.

10. The Car Line agrees when necessary to furnish the labor required to carry out the provisions of this agreement for the refrigeration and/or heating of cars. At stations where it is impracticable or undesirable to employ a regular icing force or special employees, and the furnishing of ice or the inspection of cars moving under refrigeration or heater service is not regularly required, but where for the expeditious handling of freight the Car Line may be dependent upon the Railroads for temporary labor assistance, the Railroads agree to have their employees, acting as agents for the Car Line, promptly perform the necessary service for the Car Line. When it is necessary for the Railroads to employ extra help or incur extra expense to perform any of the foregoing services the Car Line shall reimburse the Railroads for all expense incurred thereby; it being contemplated that the payments payable by the Railroads to the [68] Car Line under Section 3 hereof are compensation for the performance of all such services by the Car Line with its own employees and at its own expense.



11. The Car Line hereby agrees that it will, and does hereby, assume all risk of loss or damage to its own property used in connection with the performance of this contract; and the Car Line furthermore agrees to indemnify and save harmless the Railroads against any and all liability for accidents howsoever caused, resulting in injuries to its officers, agents or other employees or any of them, or loss of or damage to property belonging to any such officers, agents or other employees, or any of them, on the lines of the Railroads covered by this agreement, which may be suffered by any of them on or about the property, premises, trains, engines or cars of the Railroads while acting for or in the discharge of their duties in behalf of the Car Line; and the Car Line further agrees to save harmless and indemnify the Railroads against any and all such claims whatsoever, growing out of or in any wise connected with such injury or death, or loss or damage to persons or property of any of its said officers, agents or other employees; including all court costs, counsel fees and necessary expenses growing out of any suit or claim for such injury, death, loss or damage to such person or property. The Car Line further agrees to save harmless and indemnify the Railroads against any and all claims of whatsoever kind growing out of or in any wise connected with any injury or death or loss or damage to any other person or property on or about the property, premises, trains, engines or cars of the Railroads, including all court costs, counsel fees and other necessary expenses when caused by or

resulting from any accident for which the Car Line or its officers, agents, or other employees may be responsible, or from any acts of such officers, agents, or employees, or any of them, when acting for or in the discharge of their duties to the Car Line. [69]

12. The Car Line agrees that it will be responsible to and will indemnify the Railroads for all damages to perishable freight arising from flooding, improper refrigeration or heating which it has agreed to perform hereunder, defects in cars, or inattention to drain pipes, on shipments moving under refrigeration or heater service, for which damages the Railroads are responsible and pay. The Car Line shall reimburse the Railroads for any expenditures made by them on account of such damages, including the Railroads' proportion of payments made in settlement of such damages the responsibility for which cannot be located; but the Car Line shall not be held responsible for damages to less than carload shipments handled in peddler cars except when, through the negligence of the Car Line, such damages result from insufficient icing or the furnishing of defective, insufficient or improper heating appliances or fuel.

The Car Line shall not be responsible for damages resulting from freezing unless the freezing was caused by improper refrigeration or heating or defects in cars moving under refrigeration or heater service.

13. The Car Line shall not assume responsibility for damages arising from defective equip-

ment when such equipment is not the property of, or in control of, or furnished by, the Car Line.

14. When a delay in the handling of cars by the Railroads between icing stations exceeds twelve hours, and such delay has caused a reduction of ice in the bunkers of any car of fifty (50) percentum or more, the responsibility for damage to the shipment, to the extent attributable to such delay, shall be assumed by the Railroads; provided that the bunkers in said cars were properly iced in accordance with instructions when said car was moved from the last regular icing station at which it was required to be iced. When such delays occur the Railroads shall [70] notify the local representative of the Car Line who shall arrange for re-icing at intermediate or emergency icing station.

The Car Line shall not be held responsible for failures to ice cars due to the neglect of the Railroads to promptly set cars at regular icing stations for icing in accordance with then existing instructions.

15. The Railroads shall, in so far as they lawfully may, furnish transportation to such employees of the Car Line in pursuance of their duties under this agreement as shall be designated by the Car Line, provided the issuance of such transportation comes within the customs and practices of the Railroads in connection with their own employees.

16. The Railroads shall furnish the Car Line such telegraph and telephone service over their own wires, as they lawfully may, for the proper conduct of the business of the Car Line covered by this agreement.

The Railroads will also make requests upon the Western Union Telegraph Company for the issuance of franks for the Car Line customary for the conduct of business of the Railroads, in so far as such franks may be lawfully issued.

Any service rendered over wires leased by the Railroads will be paid for by the Car Line on the basis of number of telegrams handled for the Car Line as compared with the total number transmitted over such leased wire.

The provision contained in this section 16 relative to furnishing franks and/or telegraph service to the Car Line is subject to such modifications as are or may be necessary to conform to the provisions of any agreements now or hereafter existing between The Western Union Telegraph Company and the Railroads. [71]

17. The cost of installing tracks at ice plants necessary for the icing of cars in transit or for transit shall be borne by the Railroads.

18. The Car Line shall provide and maintain at its expense fixed properties such as icing stations or icing platforms necessary for the proper conduct of the business of the Railroads. The Railroads shall at their cost install such tracks as are necessary for the icing of cars enroute or pre-icing for shipment. Any tracks necessary for the loading or unloading of ice, or for the loading or unloading of material and supplies at plants of the Car Line shall be installed and maintained at its expense. The ground necessary for such improvements and tracks of the Car Line now installed on

property of the Railroads with their consent shall be furnished by the Railroads at a rental of six (6) per centum per annum computed on the value of such property. The ground necessary for such improvements hereafter installed on property of the Railroads with their consent shall be furnished by the Railroads at an annual rental based upon the value thereof and the current rate of interest as then determined.

The Car Line shall pay all taxes upon such ground rented from the Railroads, including the improvements thereon.

Whenever, under the terms of this agreement, ground belonging to the Railroads (with or without improvements or facilities) is rented or leased to the Car Line, the value of such ground and facilities shall be determined in the following manner, to wit: the value shall, in the first instance, be fixed by the owner of such land and the amount so fixed shall be reported in writing to the Car Line. If no written objection is made to such value by the Car Line within ninety days from the receipt of such report such value shall be conclusive. If written objection is made by the Car Line within ninety days and [72] the owner and the Car Line cannot agree upon a proper value, they shall then call in a disinterested and qualified third person to act as arbitrator, and the value fixed by him shall be conclusive upon the parties in interest. All assessments chargeable to capital account upon such properties made after the determination of the value thereof shall be added to the value deter-

mined as aforesaid and be deemed thereafter included in the value thereof as a basis of rentals.

19. The Car Line with the consent of the Railroads in each instance shall have the privilege of having work performed for it in any department of the Railroads, paying for such work the cost thereof plus usual percentages.

20. In the event that the Railroads furnish the Car Line with any tools, supplies, appliances, material or equipment of any kind, the charge therefor shall be the cost to the Railroads at the station where the said tools, supplies, appliances, material or equipment are furnished, plus five (5) per centum for superintendence. The actual cost at the station where furnished shall include store expense (if any incurred) and freight charges at tariff rates.

21. The Car Line shall keep complete records, including seal records, of the handling, passing, icing and heating of refrigerator cars, including peddler or pick-up cars, which contain shipments moving under refrigeration or heater service, perform service incidental to the refrigeration service of the Railroads, and furnish to the carriers, shippers, consignees or connecting lines, necessary information as to the service on the lines of the Railroads. The Railroads agree that their agents or other employees shall, at stations where it may become necessary to keep the local records of handling, and furnish the Car Line necessary reports of such service. The Railroads shall, however, be consulted as to the necessity for [73] such local

records, and in case the Railroads decide that certain of them are of insufficient value to warrant the expense of compiling them, they shall be discontinued, or others shall be substituted for them at the request of the Railroads.

22. In case the Railroads require it, the Car Line shall furnish ice for filling any of the Railroads' ice houses, provided the Car Line's supply of ice on hand at the time is sufficient for its own needs and those of the Railroads, and the charge therefor shall be the cost of the ice on board the cars at the point where manufactured or furnished, or at siding at pond where the ice was cut.

23. Any controlled but independently operated railroad company of either the Southern System or the Union System may, with the consent of its parent company, make direct settlements with the Car Line of accounts solely between said controlled railroad company and the Car Line.

24. Southern Pacific Company and Union Pacific Railroad Company severally guarantee, each to the other and each to the Car Line, that each and all of the owned, operated and controlled railroad companies, members of its system, covered by this agreement shall comply with and perform all of the terms hereof applicable to such company, in like manner as though such company were a formal party hereto.

25. This agreement shall inure to the benefit of and be binding upon the successors and assigns of the respective parties hereto. Nothing in this agreement shall confer any rights upon any party

other than the parties executing this agreement and the companies named in Appendix A hereto, and their successors or assigns.

26. Upon being approved by the Interstate Commerce Commission, this agreement shall become effective on the first day of July, 1942, superseding as of that date the agreement between the parties hereto dated July 1, 1936, with respect to subject matter covered by this agreement. It shall continue in effect until December 31, 1943, and from year to year thereafter unless and until terminated by written notice of at least one year, given by one of the parties hereto to each of the others, of its election to terminate this agreement on December 31st of the year 1943, or of any year thereafter.

In Witness Whereof, the parties hereto have executed this instrument in several counterparts, each an original and each having the effect of all, as of the day and year first above written.

PACIFIC FRUIT EXPRESS  
COMPANY,

By H. GIDDINGS,

Vice President & General  
Manager.

(Corporate Seal)

Attest:

ROY G. HILLEBRAND,  
Assistant Secretary.

SOUTHERN PACIFIC  
COMPANY,

By W. A. WORTHINGTON,  
Vice President.

(Corporate Seal)



Attest:

W. F. BULL,  
Secretary.

UNION PACIFIC RAILROAD  
COMPANY,

By F. W. CHARSKE,  
Chairman Executive Committee.

(Corporate Seal)

Attest:

E. G. SMITH,  
Secretary. [75]

### Appendix A.

#### Part I.

The following companies, owned, operated or controlled by Southern Pacific Company, are included in contract between Pacific Fruit Express Company and Southern Pacific Company and Union Pacific Railroad Company dated July 1, 1942, and are collectively called therein "Southern System":

Southern Pacific Company

Texas and New Orleans Railroad Company

Holton Inter-Urban Railway Company

Northwestern Pacific Railroad Company

Pacific Electric Railway Company

Petaluma and Santa Rosa Railroad Company

San Diego and Arizona Eastern Railway Company

Visalia Electric Railroad Company

#### Part II.

The following companies, owned, operated or controlled by Union Pacific Railroad Company, are included in contract between Pacific Fruit Express

Company and Southern Pacific Company and Union Pacific Railroad Company dated July 1, 1942, and are collectively called therein "Union System":

Union Pacific Railroad Company

Saratoga and Encampment Valley Railroad Company

Yakima Valley Transportation Company [76]

## Appendix B

### Unit Services and Prices

Refrigeration Service:

(1) Ice.

(a) Delivered in bunkers of a refrigerator car—per ton, \$ (See Note).

(b) Delivered on top of load in body of car—per ton, \$ (See Note).

Note: Southern System or Union System, as the case may be, will pay the Car Line the latter's cost per ton of ice so delivered, but upon the occurrence of any event which shall make it appear that the yearly weighted average cost per ton of the ice so to be paid for by Southern System, during any calendar year, shall exceed \$3.80 per ton, delivered in bunkers, or \$5.81 per ton, delivered on top of load in bodies of cars, or that the yearly weighted average cost per ton of ice to be paid for by Union System, during any calendar year, shall exceed \$4.53 per ton, delivered in bunkers, or \$5.16 per ton, delivered on top of load in bodies of cars (said sums representing the estimated yearly weighted average costs per ton), the Car Line shall immediately advise the Southern Pacific Company, if such excess be for the Southern System, or the

Union Pacific Railroad Company, if such excess be for the Union System, of such fact, and the amount by which the estimated yearly weighted average cost probably will be exceeded and the reasons therefor, and the Railroad, so advised, in turn, will promptly transmit such information to the Interstate Commerce Commission. [77]

Cost per ton of ice delivered in bunkers, or on top of load in bodies of cars, shall include production cost, maintenance and running expenses of ice plants, storage houses, icing platforms, cost of ice purchased, freight charges at Company-material rate of 5 mills per ton-mile for transportation of ice, and a proper proportion of general expenses. In computing such costs, there shall be included a return at the rate of 6 per cent per annum on the value of property of the Car Line employed, depreciation at the rate of 4 per cent per annum on the book cost of such property subject to depreciation, and applicable taxes.

(2) Salt.

Delivered in bunkers of a refrigerator car—per 100 pounds .....\$ .75

~~(3) Supervision. ("Supervision" as used here, is as defined in 222 I.C.C. 245, at page 250.)~~

~~(a) Per icing in bunkers of a refrigerator car .....\$2 .55~~

~~(b) Per icing in body of a car .....\$2.55~~

By amendment executed April 8, 1942, this item (3) under Refrigeration Service was amended to read as follows:

(3) Supervision: ("Supervision" as used here, is as defined in 222 I. C. C. 245, at page 250.)

(a) Per icing in bunkers of a refrigerator car .....\$1.52

(b) Per icing in body of a car.....\$1.52

(c) Per trip per car when refrigeration services covered by Section 2 of Perishable Protective Tar-iff are performed .....\$1.97

(Charges under Items (3) (a) and (3) (b) will be paid by the System on the lines of which the icings are performed. Charges under Item (3) (c) will be paid by the System handling the shipments from the point from which any charge under Sec-tion 2 of the Perishable Protective Tariff is first applicable. All other services specified in this Ap-pendix will be paid in accordance with Section 3 of this Contract.)

(4) Repairs to refrigerating devices. (This item includes cleaning of tanks and drains and around hatchways.)

Per car per trip in which ice is placed in bunkers .....\$5.00

(5) Repairs of damage caused by top or body ice. (This item includes cleaning occasioned solely by top or body icing.)

Per car per trip in which ice is placed in body of car for protection of perishable freight.. . \$6.01

.. (6) Precooling of a refrigerator car.....\$6.63

(7) Papering cars—per car papered for protec-tion against heat.

(a) For juice loading.....\$10.93

(b) For shrimp loading in steel cars.....\$ .56

(c) For shrimp loading in wood cars.....\$1.36

Heater Service:

(1) Car Heaters. (This item covers the entire cost of furnishing heaters.)

Per inspection incident to heater service...\$ .22

(2) Heater Fuel. (This item covers the delivered cost of fuel in storage.)

Per inspection incident to heater service..~~\$.13~~.10†

Note: If the cost of fuel furnished by Car Line during any calendar year to either System shall in fact exceed the aggregate charges therefor during such year upon the stated unit price per inspection, such System shall pay the Car Line the amount of such excess. Immediately upon the occurrence of any event which shall make it appear that such excess payments will be made by either System, the Car Line shall advise the Southern Pacific Company, if such excess payments will be for the Southern System, and the Union Pacific Railroad Company, if such excess payments will be for the Union System, and of the probable amount thereof, and the Railroad, in turn, will promptly transmit such information to the Interstate Commerce Commission.

(3) Servicing of Heaters.

Per inspection incident to heater service....\$ .72

(Each installation, removal, or other attention, whether or not any fuel is supplied, fires lighted or extinguished, or other manipulation performed, shall be considered an inspection.)

(4) Supervision. ("Supervision" as used here is as defined in 222 I. C. C. 245, at page 250, except

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† By amendment executed April 8, 1942 this unit price was changed from \$.13 to \$.10. [80]

that it relates to time devoted to shipments afforded protective service against cold instead of refrigeration service.)

Per inspection incident to heater service . . . \$ .34

(5) Papering Cars.

Per car papered for protection against cold. \$1.01

(6) Preheating of Cars.

Per car preheated . . . . . \$ .95

#### Ventilation Service:

(1) Supervision. ("Supervision" as used here is as defined in 222 I. C. C. 245, at page 250, except that it relates to time devoted to shipments moving under ventilation service instead of refrigeration service.)

Per inspection, whether or not ventilating devices are manipulated . . . . . \$ .54

#### Loss and Damage Claim Expenses:

(1) Hazard. (This item covers a reasonable allowance to cover liability assumed by the Car Line in respect of claim payments and all expenses incident to the investigating, handling, defense and payment of claims.) [81]

(a) For each car moving under refrigeration service—per trip . . . . . \$ .34

(b) For each car moving under heater service—per trip . . . . . \$1.07

The parties hereto recognize that the foregoing unit prices are experimental in character, and that the reasonableness thereof will be affected by changing price and wage levels and other circumstances, and, therefore, agree that the said unit prices, or any of them, may be revised at any time by agreement of the parties hereto, subject to the

provisions of Section 1 (14) (b) of the Interstate Commerce Act, as amended, and the parties agree, further, that upon request of any party hereto, re-examination will be made of said unit prices by all of the parties, to the end of agreeing upon such adjustments as may be just, reasonable and proper under the conditions then prevailing.

[Endorsed]: Filed Nov. 10, 1947. [81-A]

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[Title of District Court and Cause.]

### OPINION

Goodman, District Judge.

This case involves the right of plaintiff, an employee of Pacific Fruit Express Company, a corporation engaged in railroad refrigeration service, to maintain an action for damages under the Federal Employers' Liability [82] Act, (45 USC Sec. 51) against the Pacific Fruit Express Company and the Southern Pacific Company, a railroad common carrier.

The parties have stipulated that upon the pleadings and stipulation of facts submitted at pre-trial conference, the Court shall determine whether plaintiff, at the time of the accident and injury complained of, was an employee of a common carrier by railroad within the meaning of the Federal Employers' Liability Act. The parties have also agreed that if the court resolves the question in favor of plaintiff, the cause may be set for trial; otherwise appropriate judgment disposing of the cause may be entered, in which event exception may be reserved to the plaintiff.

## THE FACTS

At the time of the accident described in the complaint plaintiff was employed as an ice man in the icing yard and plant owned and operated by the Pacific Fruit Express Company at Bakersfield, California. He and fellow employees were engaged in unloading ice from a refrigeration car belonging to the Express Company. While plaintiff was aiding in moving an empty car from a loading platform, the wheels of a loaded car, which was being drawn up to the platform by a cable and winch, struck and injured him.

Pacific Fruit Express Company is a corporation which was organized in 1906 and commenced operations October 1, 1907. Its business is the hiring to common carriers by rail, of cars (known as "reefers") specially designed to transport perishable commodities, and providing such cars—and similar cars of other companies when presented to it by a common carrier by rail,—with heater and refrigeration service to protect their contents against temperature changes and excesses. It also repairs, in its shops, the cars of [83] other car companies. Since its inception, Pacific Fruit Express Company has had the same two stockholders, owning its entire outstanding issue in equal shares. They are the defendant Southern Pacific Company and the Union Pacific Railroad Company, both corporate common carriers by railroad engaged in part in interstate commerce. The two stockholders have no connection each with the other through stockholdings or common directors. Prior to the organi-



zation of Pacific Fruit Express Company, the two railroads obtained the type of service, thereafter provided by Pacific Fruit Express Company, from third persons under contract. At no time have they directly provided such services to their shippers, nor themselves owned any "reefers."

Pacific Fruit Express Company rents its reefers not only to its stockholders, but also to other common carriers for use in railroad service throughout the United States. Rental is charged at a uniform rate on a mileage basis. Pacific Fruit Express Company also provides, for a consideration, heater and refrigeration protective service similar to that furnished Southern Pacific Company and Union Pacific Railroad Company, to other carriers whose lines give them access to the plants of the Pacific Fruit Express Company.

In furtherance of its activities, Pacific Fruit Express Company owns and operates in several states, near the facilities of rail common carriers, plants, car shops, material and equipment for the maintenance, repair, rebuilding and servicing of reefers and heater units, and for the manufacture of ice. The ice yard at Bakersfield where plaintiff was injured was such a plant. Service is provided from that plant to Southern Pacific Company and to two other common carriers as well. (A. T. & Santa Fe and Sunset Railway.) [84]

In 1946, Pacific Fruit Express Company's net worth was over \$40,000,000.00. Some of its assets (real estate) have been acquired from its stockholders by purchase and lease; the remainder, from

other sources including concerns which had theretofore provided similar protective service to Southern Pacific Company and Union Pacific Railroad Company.

The business of the Pacific Fruit Express Company is conducted through and by its own officers and employees who, except for directors having railroad connections, are not employed by any other firm, person or corporation. At the Bakersfield plant where plaintiff was injured, there were no employees of Southern Pacific Company engaged in performing services on behalf of Pacific Fruit Express Company.

In the performance of its business, Pacific Fruit Express Company neither moves nor controls the movement of "reefers" to and from or beyond its icing docks and plants. Such movements are handled by rail common carriers, principally Southern Pacific Company or Union Pacific Railroad Company. This was true in the case of the cars being unloaded when plaintiff was injured. Pacific Fruit Express Company possesses no rail motive power, except one plant locomotive used for shop switching purposes. The only railroad tracks owned by Pacific Fruit Express Company are shop tracks and unloading tracks. The former are used only in the operation of its car shops. The latter are used only for deliveries of ice to Pacific Fruit Express Company for use in its icing service. The only movement of reefers by Pacific Fruit Express Company are at its own shops and plants, on and along these tracks. These movements are incidental to the

repair and rebuilding of reefers in the Pacific Fruit Express Company shops and the servicing of reefers at the Pacific Fruit Express Company ice plants. [85]

Both Southern Pacific Company and Union Pacific Railroad Company supply their shippers with "reefer" protective service under Perishable Protective Tariff No. 14, through the Pacific Fruit Express Company. The shippers specify to the carrier, in writing, the type of service desired; they may, by written order, change the type of service originally requested. There are various kinds of service available to the shippers under the tariff. The shipper's orders are transmitted by the carrier to the Pacific Fruit Express Company. The only orders given Pacific Fruit Express Company by Southern Pacific Company or Union Pacific Railroad Company in the performance of protective service are those whereby the orders of the shipper relating to the character of service desired, are transmitted. Pacific Fruit Express Company transacts none of its protective service business directly with the shippers. It publishes no tariffs, issues no bills of lading and makes no charges for such services except to common carriers by rail, to whom it is solely responsible and from whom alone it receives its compensation. The same is true of its car hiring business, except for the letting of a few 'reefers' to shippers on a monthly basis, but not as a part of its regular operations. The only other revenue of Pacific Fruit Express Company is derived from other car companies for

the repair of their cars delivered at Pacific Fruit Express Company shops.

Superceding an earlier contract dated July 1, 1936, the Pacific Fruit Express Company on July 1, 1942, entered into a written contract with the Southern Pacific Company and the Union Pacific Railroad Company. This contract contained the terms and provisions relating to so-called protective service against heat or cold to be performed by the express company for property transported by the railroad [86] companies. This contract, after having been approved by the Interstate Commerce Commission, has been effective continuously since July 22, 1942. In general the contract fixed the compensation to be paid Pacific Fruit Express Company; provided for certain services to be rendered to the railroad companies; fixed the formulas for cooperation between the employees of Pacific Fruit Express Company and the railroad companies; provided for indemnification of the railroad companies against liability for injury or damage to personnel or property of the railroad companies while acting on behalf of the Pacific Fruit Express Company; fixed and delineated responsibility of the Pacific Fruit Express Company for damage to any freight as a result of any improper service on the part of the express company, and otherwise, in respects not necessary to be detailed, prescribed the operating duties and liabilities of the parties. Paragraph 8 of the agreement has been discussed in detail by the plaintiff and urged by him as being vital to the determination

of the issue. It provides that "orders of the system on whose tracks loading, unloading or movement takes place shall be promptly and strictly obeyed." Likewise plaintiff places reliance on paragraph 1 of the agreement which provides that the Pacific Fruit Express Company shall perform the services specified in the contract "as the agent of the railroads."

## DISCUSSION

Plaintiff contends that the Pacific Fruit Express Company is a common carrier by railroad and hence within the reach of the Federal Employers' Liability Act. The Court holds to the contrary. The act itself subjects freight common carriers by railroad, while engaging in commerce between any of the several states or territories, [87] to liability in damages to any person suffering injury while employed by such carrier in such commerce. 45 USC 51. There does not seem to be any doubt at all that the business of renting refrigerator cars to railroads or shippers and providing protective service in the transportation of perishable commodities is not of itself that of a common carrier by railroad. *Ellis v. Interstate Commerce Commissioner*, 237 U.S. 434; *U.S. v. Fruit Growers Express Co.* 279 U.S. 363; *Wells Fargo & Co. v. Taylor*, 254 U.S. 175; *U. S. ex rel. Chicago Refrigerator Company v. Interstate Commerce Comm.* 265 U.S. 292; *Reynolds v. Addison Miller Co.* 143 Wash. 271, 255 Pac. 110.

The Federal Employers' Liability Act was

amended in 1939. At that time, despite earlier decisions, some of which have been cited, no effort was made to include refrigerator companies within its terms. Congressional inactivity in that regard must be given its usual implication, i.e. acquiescence in the judicial rulings.<sup>1\*</sup> Federal legislation concerning the social security of of employees employed in Interstate Commerce specially included employees of Refrigerator Companies within the meaning of the term carrier,<sup>2\*</sup> thus indicating Congressional awareness of the actualities. Thus the terms of the statute, plus the judicial interpretations of its meaning and the obvious knowledge of the Congress over a long period of time as to such judicial pronouncements, make it abundantly clear that Pacific Fruit Express Company itself is not a common carrier by rail and not subject to the provisions of the Act. [88]

The record does not disclose any circumstance in any way indicating that either the organization of Pacific Fruit Express Company nor its subsequent operations purposed any duplicitous design to accomplish evasion of the Act. The Pacific Fruit Express Company was organized to commence business before the enactment of the Liability Act. It acquired none of its operating facilities from its

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<sup>\*1</sup> U.S. v. Elgin, Joliet & Eastern R.R. Co. 298 U.S. 492, 500.

<sup>\*2</sup> The Railway Labor Act, 45 USC 151; The Railroad Retirement Act, 45 USC 228a; The Railroad Retirement Tax Act, 26 USC 1532; The Carriers Taxing Act, 45 USC 261; Railroad Unemployment Insurance Act, 45 USC 351.

railroad stockholders; the railroad stockholders are distinct and separate entities. The Pacific Fruit Express Company operates under its own management with its own facilities and employees who are not otherwise employed. Also it serves other carriers and car companies in addition to the two railroad stockholders. Consequently there is no basis for concluding that the Pacific Fruit Express Company was used by the defendant Southern Pacific Company "as a device to obtain the forbidden end." *Ellis v. Interstate Commerce Comm. supra.*

It is also urged by the plaintiff that the corporate organization of the Pacific Fruit Express Company and its relation to the Southern Pacific Company so identifies and integrates it with that railroad as to make it as well a common carrier by rail. It is true that the Pacific Fruit Express Company came into being with the prime purpose of furthering the transportation enterprise of its two stockholder railroads. It may be said that the two railroad companies could themselves well have performed the functions of Pacific Fruit Express Company as an integral part of their own common carrier business. But, absent trickery or device, this factor cannot in law make the Pacific Fruit Express Company the alter ego of the Southern Pacific Company. *Ellis v. Interstate Commerce Comm. supra*; *U. S. v. Elgin, Joliet & Eastern R.R. Co., supra.* [89]

Section 5 of the Federal Employers' Liability Act, 45 USC 55, provides as follows:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which

shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."

The creation of the Pacific Fruit Express Company, although intended to further the transportation business of its two railroad stockholders, occurred before the Act was passed. There is therefore no basis for a charge that creation of Pacific Fruit Express Company violated Section 5. *Chicago, R. I. etc. v. Bond*, 240 U.S. 449; *Robinson v. B. & O.*, 237 U.S. 84; *Wells Fargo v. Taylor*, *supra*.

It is suggested that the so-called indemnity clause of the Protective Service Contract amounts to a violation of Section 5. But inasmuch as this clause is one merely of indemnity, it does not have the effect of exempting the railroads from their liability as common carriers under the Act. Hence in no sense may it be considered a violation of Section 5.

We come now to the more substantial contention urged by the plaintiff—that the Protective Service Contract of July 1, 1942, created an agency relationship between the Pacific Fruit Express Company and the Southern Pacific Company. Paragraphs 1 and 8 of the agreement, heretofore cited, are urged by plaintiff as strong evidence that in all activities under the contract, the Pacific Fruit Express Company was no more than an agent of the Southern Pacific Company and hence that the latter is the real employer of plaintiff and subject to suit under the Act. Assuming the existence of



an agency relationship between Pacific Fruit Express Company and the Southern Pacific Company, nevertheless [90] nothing of record indicates that plaintiff was injured while pursuing activities related to the alleged agency relationship between the two defendants. The Pacific Fruit Express Company performed refrigeration services at Bakersfield in addition to those covered by the contract of July 1, 1942. It also served the Atchison, Topeka and Santa Fe Ry. and the Sunset Railway. The eventual destination of the ice which plaintiff was helping to unload at the time of his injury was neither known or foreseen at the time. Thus nothing in the record indicates that the plaintiff was injured while employed in the service of his master's master.

But in a broader sense, it is clear to the court that the contract of July 1, 1942, viewed in its entirety, was not a contract of employment at all. With its terms vitalized by actual operation this becomes manifest. The express provision of the agreement that the protective service furnished by the Pacific Fruit Express Company was "as the agent of the railroads" does not bring into existence an agency relationship, if one does not, in fact, exist. It is the sum total of the position and dealings of the parties which fixes their legal status. Whenever a legal relationship is a creature of contract, the contractual terms coupled with the meaning they have acquired from practical application, determine the nature of the relationship created. *Hearst Publications Inc. v. U.S.* 70 Fed.

Supp. 666; affirmed F.2d ; *Pacific Lumber Company v. Ind. Acc. Comm.* 22 Cal. 2d 410; *Matcovich v. Anglim*, (9 Cir.) 134 F.2d 834. Furthermore, the mere use of the word "agent" does not bring into being the status of master and servant or employer and employee. For the term "agent" is not infrequently used to designate prescribed activities in many [91] independent contract relationships. *State etc. Fund v. I.A.C.* 216 Cal. 351, 361.

The terms of the Protective Service Contract, as well as the manner of its performance, indubitably constitute the parties independent contractors. The Pacific Fruit Express Company performed with its own employees at its own expense. No right of control over the manner and means of performance was reserved to the railroads. *Hearst Publications Inc. v. U.S.* supra.

To be sure, certain conditions of performance and means of cooperation and assistance are specified in the contract. But these provisions, directed to the successful accomplishment of the contract's broad objectives, do not invest the railroads with control of the method of performance. *L.A. Athletic Club v. U.S.* 54 F. Supp. 702, at 706. cf. *Radio City Music Hall v. U.S.* 135 F.2d 715, at 718. *Hull v. Phila. R.R.* 252 U.S. 475, 480.

Cases, such as *Penn. R.R. Co. v. Roth*, 163 F.2d 161, in which the railroad company employed a contractor to operate one of its railroad yards, are not apropos, for there is absent here that substantial degree of control over the manner and means

of performance as was present in Penn. R.R. Co. v. Roth and like cases. See Chicago R.I. v. Bond, *supra*.

The remedial and humanitarian purposes of the Employers' Liability Act in no way compel an interpretation of the contract in favor of an employment or agency relationship. It is not amiss to point out that plaintiff is not without redress for his injuries. The benefits of the Workmens' Compensation Act of California are available to him. It is not for the courts to extend the coverage of the Act into new fields. During the 40 year life of the Employers' Liability Act, Congress, while liberalizing its benefits, has [92] not seen fit to extend the scope of the statute beyond railroading in its true sense.

The contention, that plaintiff's activities at the time of the accident were in connection with a railroad movement, is unsubstantial. It is true at the time one car was being manually pushed away from the loading platform, while another was being driven up by a cable and winch. A railroad movement connotes something more than the mere movement of a car over a rail. Certainly this is not enough to constitute common carriage by rail.

For the reasons stated, the cause is dismissed.

Dated: June 29, 1948.

[Endorsed]: Filed June 29, 1948. [93]

In the District Court of the United States for the  
Northern District of California, Southern Division

No. 27065-G

ROBERT H. GAULDEN,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corpora-  
tion, PACIFIC FRUIT EXPRESS COM-  
PANY, a corporation,

Defendants.

### JUDGMENT

Heretofore, in the above entitled action, defendants filed their answer to plaintiff's complaint and, agreeably to the order of this Court, the plaintiff filed a reply. Thereafter the plaintiff served and filed interrogatories, defendants served, and filed objections thereto, and the said cause and said objections came on duly and regularly to be heard before the Court on pre-trial conference. Upon said pre-trial conference by stipulation in writing, filed herein on November 10, 1947, narrative statements were filed herein and the same were deemed answers to said interrogatories, and in and by said stipulation it was provided that the issue of application of the Federal Employers Liability Act be submitted for decision on pre-trial conference on the pleadings, the stipulation, and the said statements of fact and that if the [94] Court determined that the said act did not apply it might make appropriate order and judgment disposing of the cause. Said stipulation was ap-

proved by order of the Court. The matter, having been submitted to the Court upon said stipulation and statements of fact, the Court considered the same. Thereafter and on June 29, 1948, the Court filed herein its written opinion and order stating the facts, the Court's conclusions of law, and ordering that the action be dismissed and now, the premises considered, it is

Ordered, Adjudged and Decreed that plaintiff take nothing by this action and that defendants go hence without day and have and recover of and from the plaintiff their costs of suit herein taxed at \$.....

Done in open Court this 28th day of July, 1948.

LOUIS E. GOODMAN,  
District Judge.

Approved as to form, as provided in rule 5(d).

RYAN & RYAN,  
By THOS. C. RYAN,  
Attorneys for Plaintiff.

Entered in Civil Docket July 28, 1948.

[Endorsed]: Filed July 27, 1948.

[95]

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT  
COURT OF APPEALS UNDER RULE 73-B

Notice is hereby given that Robert H. Gaulden, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from

the Final Judgment entered in this action on July 28, 1948, and from the Order, dated June 29, 1948, dismissing the above-entitled action and upon which said Order the aforesaid Judgment is based.

Dated July 28, 1948.

/s/ DANIEL V. RYAN,  
/s/ THOS. C. RYAN,  
Attorneys for Appellant,  
Robert H. Gaulden.

[Endorsed]: Filed July 28, 1948.

[96]

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Fireman's Fund Indemnity Company  
Bond No. J-70011

[Title of District Court and Cause.]

### UNDERTAKING FOR COSTS ON APPEAL

Whereas, Robert H. Gaulden, Plaintiff and Appellant in the above-entitled action, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment made and entered against it in the District Court of the United States for the Northern District of California, Southern Division, in favor of the Defendants in said action, on the 28th day of July, 1948.

Whereas, the said appellant is required to give an undertaking for costs on appeal as hereinafter conditioned.

Now, Therefore, Fireman's Fund Indemnity Company of San Francisco, California, in consideration of the premises, hereby undertakes on the part of the said appellant and acknowledges itself

bound to the said Defendants in the sum of Two Hundred Fifty and No/100 Dollars (\$250.00) that the said appellant will pay all costs which may be adjudged against it on said appeal or on a dismissal thereof, not exceeding, however, the sum of Two Hundred Fifty and No/100 Dollars (\$250.00).

It Is Further Stipulated as a part of the foregoing undertaking that in case of the breach of any condition thereof, the above entitled District Court may, upon notice to the Surety of not less than 10 days, proceed summarily in said proceedings to ascertain the amount which the said surety is bound to pay on account of such breach and render judgment therefor against the said surety and award execution thereof.

Signed, sealed and dated this 28th day of July, 1948.

**FIREMAN'S FUND**

**INDEMNITY COMPANY,**

(Seal)        /s/ A. J. CLEFFI,  
                 Attorney-in-Fact.

(Verification.)

The premium charged for this bond is Ten and No/100 Dollars per annum. [97]

[Endorsed]: Filed July 28, 1948.

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[Title of District Court and Cause.]

**STATEMENT OF THE POINTS ON WHICH  
APPELLANT INTENDS TO RELY ON  
APPEAL**

Comes now plaintiff and appellant, Robert H. Gaulden, and presents herewith his designation of

points on which he intends to rely on appeal:

1. That the Pacific Fruit Express Company is a common carrier by railroad under the terms of the Federal Employers' Liability Act, particularly in view of the Agency Contract between the Pacific Fruit Express Company and the Southern Pacific Company, which plaintiff and appellant contends constitutes sufficient control by defendant, Southern Pacific Company, over the employees of Pacific Fruit Express Company to constitute the Pacific Fruit Express and plaintiff, its employee, as agents of the defendant, Southern Pacific Company, a common carrier by rail [98] road, at the time of plaintiff and appellant's injury.

2. The voluntary payments by the Pacific Fruit Express Company under the State Industrial Accident Commission of California is no bar to recovery under the Federal Employers' Liability Act, but such voluntary payments may be deducted against any judgment that might be obtained under the Federal Employers' Liability Act.

Dated July 28, 1948.

/s/ DANIEL V. RYAN,

/s/ THOS. C. RYAN,

Attorneys for Plaintiff and Appellant, Robert H. Gaulden.

(Acknowledgment of receipt of copy.)

[Endorsed]: Filed July 28, 1948.

[99]



[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

To the Clerk of the above-entitled Court; and to defendants and appellees, Southern Pacific Company, a corporation, Pacific Fruit Express Company, a corporation, and to Messrs. Dunne & Dunne, attorneys for said defendants:

You, and each of you, will please take notice that plaintiff and appellant herein, Robert H. Gaulden, hereby makes the following designation of contents of record on appeal:

1. The complaint.
2. The answer.
3. The pre-trial written stipulation and order filed November 10, 1947.
- 3-a. Interrogation and additional interrogation.
4. The narrative statements by defendants in answer to interrogatories.
5. The copy of the Protective Service Contract [100] between the Pacific Fruit Express Company, the Southern Pacific Company and the Union Pacific Railroad Company, dated July 1, 1942.
6. The reporter's transcript, including the stipulation of facts made verbally at a pre-trial conference, dated October 13, 1947.
7. The opinion and order of the trial Judge, Honorable Louis E. Goodman, filed June 29, 1948.

8. Notice of appeal on which appellant intends to rely on appeal.

9. Statement of points.

10. Judgment.

Dated July 28, 1948.

/s/ DANIEL V. RYAN,

/s/ THOS. C. RYAN,

Attorneys for Appellant and Plaintiff, Robert H. Gaulden.

(Acknowledgment of receipt of copy.)

[Endorsed]: Filed July 28, 1948.

[101]

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[Title of District Court and Cause.]

DEFENDANTS' (AND APPELLEES')  
DESIGNATION OF RECORD

Comes Now the Defendants and Appellees and, agreeably to Rule 75 of the Federal Rules of Civil Procedure, they and each of them designates additional portions of the record, as follows:

1. This designation.
2. The Reporter's Transcript of the proceedings had in the week of June 28, 1948.
3. Defendant's objections to interrogatories and additional interrogatories or request therefor.
4. Defendants' notice of motion to compel reply [102] to defenses and supporting affidavit.

5. Reporter's Transcript of proceedings had on motion to compel reply, in proceedings of June 30, 1947.

6. Order directing plaintiff to reply to defenses.

7. Plaintiff's reply.

Dated at San Francisco, July 29, 1948.

/s/ ARTHUR B. DUNNE,

/s/ DUNNE & DUNNE,

Attorneys for Defendants and  
Appellees.

Receipt of a copy of the within designation is hereby admitted this 30th day of July, 1948.

/s/ RYAN & RYAN,

By /s/ DANIEL V. RYAN,

Attorneys for Plaintiff and  
Appellant.

[Endorsed]: Filed July 30, 1948.

[103]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
RECORD ON APPEAL AND DOCKETING  
ACTION

Good cause appearing therefor, it is hereby ordered that plaintiff and appellant above named, Robert H. Gaulden, may have an extension of forty (40) days, that is, to and including October 16,

1948 within which to file the record on appeal and docket the action herein in the United States Court of Appeals for the Ninth Circuit.

Dated September 7th, 1948.

LOUIS E. GOODMAN,  
Judge of the District Court.

No previous extension granted. Notice of Appeal was filed on July 28, 1948.

[Endorsed]: Filed Sept. 7, 1948.

[104]

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District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 104 pages, numbered from 1 to 104, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Robert H. Gaulden, Plaintiff, vs. Southern Pacific Company and Pacific Fruit Express Company, Defendants, No. 27065-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$13.20, and that said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my

hand and affixed the seal of said District Court at San Francisco, California, this 13th day of October, A. D. 1948.

(Seal) C. W. CALBREATH,  
Clerk. [105]

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[Endorsed]: No. 12062. United States Court of Appeals for the Ninth Circuit. Robert H. Gaulden, Appellant, vs. Southern Pacific Company and Pacific Fruit Express Company, Appellees. Transcript of Record. Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 14, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

United States Court of Appeals for the  
Ninth Circuit

No. 12062

ROBERT H. GAULDEN,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,  
and PACIFIC FRUIT EXPRESS COM-  
PANY, a corporation,

Appellees.

STATEMENT OF THE POINTS ON WHICH  
APPELLANT INTENDS TO RELY  
ON APPEAL

Comes now appellant and plaintiff, Robert H. Gaulden, and presents herewith his designation of points on which he intends to rely on appeal:

1. That Pacific Fruit Express Company is a common carrier by railroad under the terms of the Federal Employers' Liability Act, particularly in view of the Agency Contract between the Pacific Fruit Express Company and the Southern Pacific Company, which appellant contends constitutes sufficient control by appellee, Southern Pacific Company, over the employees of Pacific Fruit Express Company to constitute the Pacific Fruit Express Company its agent. The appellant being an employee of Pacific Fruit Express Company, an agent of the Southern Pacific Company, thus likewise becomes an employee of Southern Pacific Company a common carrier by railroad.

2. The voluntary payments by the Pacific Fruit Express Company under the State Industrial Accident Commission of California is no bar to recovery under the Federal Employers' Liability Act, but such voluntary payments may be deducted against any judgment that might be obtained under the Federal Employers' Liability Act.

3. That appellee, Pacific Fruit Express Company, was at the time of the accident to appellant herein a common carrier by railroad under the provisions of the Federal Employers' Liability Act.

Dated October 14, 1948.

/s/ DANIEL V. RYAN,

/s/ THOS. C. RYAN,

Attorneys for Appellant and Plaintiff, Robert H. Gaulden.

(Acknowledgment of Service.)

[Endorsed]: Filed October 14, 1948. Paul P. O'Brien, Clerk.

---

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

To the Clerk of the above-entitled Court and to defendants and appellees, Southern Pacific Company, a corporation, Pacific Fruit Express Company, a corporation, and to Messrs. Dunne & Dunne, attorneys for said defendants:

You, and each of you, will please take notice

that appellant and plaintiff herein, Robert H. Gaulden, hereby makes the following designation of contents of record on appeal:

1. The complaint.
2. The answer.
3. The pre-trial written stipulation and order filed November 10, 1947.
4. The narrative statements by defendants in answer to interrogatories.
5. Copy of the Protective Service Contract between the Pacific Fruit Express Company, the Southern Pacific Company and the Union Pacific Railroad Company, dated July 1, 1942.
6. The opinion and order of the trial Judge, Honorable Louis E. Goodman, filed June 29, 1948
7. Judgment.
8. Notice of Appeal.
9. Statement of points relied upon by appellant and plaintiff on appeal.

Dated October 14, 1948.

/s/ DANIEL V. RYAN,

/s/ THOS. C. RYAN,

Attorneys for Appellant and Plaintiff, Robert H. Gaulden.

(Acknowledgment of Service.)

[Endorsed]: Filed October 14, 1948. Paul P. O'Brien, Clerk.



[Title of U. S. Court of Appeals and Cause.]

APPELLEES' COUNTER DESIGNATION OF  
ADDITIONAL PARTS OF RECORD TO BE  
PRINTED

Appellees, Southern Pacific Company, a corporation, and Pacific Fruit Express Company, a corporation, do hereby make their counter designation of the portions of the record on appeal herein to be printed.

Appellant has heretofore designated certain portions of the record on appeal herein to be printed.

Appellees do hereby designate that the whole of the record on appeal be printed herein, except the following:

1. Demand for jury trial.
2. Interrogatories to defendants.
3. Objections to interrogatories, notice of hearing, etc.
- 3-a. Reporter's transcripts.
4. Notice of motion to compel reply.

Dated Oct. 29th, 1948.

/s/ ARTHUR B. DUNNE,

/s/ DUNNE & DUNNE,

Attorneys for Appellees.

(Acknowledgment of Service.)

[Endorsed]: Filed October 30, 1948. Paul P. O'Brien, Clerk.



No. 12,062

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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ROBERT H. GAULDEN,

*Appellant,*

VS.

SOUTHERN PACIFIC COMPANY and  
PACIFIC FRUIT EXPRESS COMPANY,

*Appellees.*

**Appeal from Order Dismissing Action by the United States  
District Court for the Northern District of  
California, Southern Division.**

**BRIEF FOR APPELLANT.**

---

DANIEL V. RYAN,

Phelan Building, San Francisco 3,

THOMAS C. RYAN,

RYAN & RYAN,

Phelan Building, San Francisco 3,

*Attorneys for Appellant.*

FILED  
DEC 21 1907  
PAUL P. O'BRIEN



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No. 12,062

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

ROBERT H. GAULDEN,

*Appellant,*

VS.

SOUTHERN PACIFIC COMPANY and

PACIFIC FRUIT EXPRESS COMPANY,

*Appellees.*

**Appeal from Order Dismissing Action by the United States  
District Court for the Northern District of  
California, Southern Division.**

**BRIEF FOR APPELLANT.**

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**JURISDICTIONAL STATEMENT.**

The United States District Court dismissed the action herein for want of jurisdiction.

Appellant contends that the District Court does have jurisdiction and that for the purpose of this action both appellees are common carriers by railroad engaged in interstate commerce under the provisions of the Federal Employer's Liability Act, 45 U.S.C.A., 51.

Appellate jurisdiction of the Court is predicated upon United States Code Annotated, Title 28, Section 225.

The complaint (Tr. of Record, p. 2) alleges the appellant had his leg cut off in an accident while he was employed by either or both appellees at Bakersfield, California on June 7, 1946 through the negligence of either or both appellees.

The complaint further alleges that both appellees at the time of the injury to appellant were common carriers by Railroad and then engaged in interstate commerce and that appellant's injury was incurred in interstate commerce and that the cause of action was brought under the Federal Employer's Liability Act, 45 U.S.C.A., Section 51. The complaint further alleges that appellee, Pacific Fruit Express Company, is and was owned by appellee, Southern Pacific Company and that at all times mentioned there existed between appellee, Southern Pacific Company, and appellee, Pacific Fruit Express Company, an Agency Contract (Tr. of Record, p. 54) providing that appellee, Pacific Fruit Express Company, act as agent for appellee, Southern Pacific Company, in icing railroad cars used in interstate commerce for and on behalf of appellee, Southern Pacific Company, and that appellee, Pacific Fruit Express Company, was at the time of the injury to appellant engaged in a joint enterprise with appellee, Southern Pacific Company, for their joint benefit and in the furtherance of interstate commerce. The complaint further alleges that appel-



lant after unloading ice was aiding in moving an empty refrigerator car and that the wheels of a loaded car, which was being drawn up to the icing platform by a cable and winch, struck and injured him.

The parties have stipulated that upon the pleadings and the stipuation at pre-trial conference (Tr. of Record p. 19) and the attached statements of fact (Subject to the reservation of objections stated in Paragraph V of said stipulation i.e. the reservation of objection is to the substance of the matter stated) that the Court should decide at pre-trial conference whether appellant at the time of his injury was an employee of a common carrier by Railroad within the Federal Employer's Liability Act. It should be noted that this appellant has not stipulated to the facts in the narrative statements but merely that such narrative statements should be deemed as answers to appellant's interrogatories. Appellant further admits that he received wages from the appellee, Pacific Fruit Express Company.

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### **THE FACTS.**

Appellant at the time of his accident was employed and received a salary as an iceman in the icing yard owned and operated by the appellee, Pacific Fruit Express Company, at Bakersfield, California. After unloading ice from a refrigerator car and while aiding in moving an empty car from a loading platform, the wheels of a loaded car, which was being drawn up to

the platform by a cable and winch, ran over and severed his right leg.

Appellee, Pacific Fruit Express Company, is in the business of giving refrigeration service to carriers by rail and has icing plants and owns its own cars. Pacific Fruit Express Company is owned fifty per cent by appellee, Southern Pacific Company, and fifty per cent by Union Pacific Railroad Company.

At the time of the injury to appellant, the appellee, Pacific Fruit Express Company, had an arrangement by written contract (Tr. of Record p. 54) with the appellee, Southern Pacific Company, a carrier by railroad and the Union Pacific Company, which contract by its terms made the appellee, Pacific Fruit Express Company, the agent for the purpose of refrigeration service of the railroad on whose line the service was done and which gave the appellee the right to control the manner in which the work was to be done. This contract in the case at bar has applicability only as between both appellees here. In answer to appellant's interrogatories, appellee, Pacific Fruit Express Company, admitted: (Tr. of Record p. 51) "It is a fact that the icing service rendered by P. F. E. under its protective service contract of July 1, 1942, between it and S. P. and U. P. applied only to S. P. in regard to the service under said contract by P. F. E. at Bakersfield on June 7, 1946 at the time of the accident to plaintiff herein." The answer to this interrogatory then states that Pacific Fruit Express also rendered icing services to others as well. Appellant

contends that the contract between the appellees gives the appellee, Southern Pacific Company, the right to control the manner in which the services are to be done in that it provides that: (Tr. of Record p. 59, Paragraph 8) "In the performance of such service, the orders of the system on whose tracks loading, unloading or movement takes place shall be promptly and strictly obeyed by the Car Line" and in Paragraph 7 of the contract (Tr. of Record p. 59) it states: "The Car Line will \* \* \* upon request of the Railroads \* \* \* perform such other services as may be required by the Railroads in regard to the preparation and publication of such tariffs".

The Contract explicitly provides in Paragraphs 1 and 2 (Tr. of Record p. 57) that "The Car Line shall undertake as the agent of the Railroads all the services necessary to the effective refrigeration" and "The Car Line agrees, as agent for the Railroads, to furnish ice necessary for the protection of all perishable freight handled by its Railroads".

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#### **STATEMENT OF THE CASE.**

Appellant received his salary from the appellee, Pacific Fruit Express Company. He was injured in a manual movement of a refrigerator car at the icing plant of the Pacific Fruit Express Company at Bakersfield, California. Pacific Fruit Express Company at the time was under contractual relationship with the appellee, Southern Pacific Company, (Tr. of

Record p. 54) wherein Pacific Fruit Express Company covenanted it was to act as agent for the appellee, Southern Pacific Company, and that Southern Pacific Company might be called on to provide the tools and some labor for the icing and refrigeration of cars, and it would obey the orders of the appellee, Southern Pacific Company, in the performance of the service called for by the contract, (Paragraph 8 of contract—Tr. of Record p. 59) and would perform such other services as may be required by the railroads (Southern Pacific Company) (Tr. of Record p. 59) in regard to the preparation and publication of tariffs.

In view of the terms of the written Agency Contract between the appellee, Southern Pacific Company, and the appellee, Pacific Fruit Express Company, appellant contends that appellee, Southern Pacific Company, had the right to control the method of icing operations provided for by the contract and thus the Pacific Fruit Express Company was the agent of the Southern Pacific Company, a common carrier by railroad, and that appellant thus comes within the provisions of the Federal Employer's Liability Act. Appellant further contents that both appellees were engaged in a joint enterprise for the mutual advantage of both and further that the contract violated Section 5 of the Federal Employer's Liability Act (45 U. S. C. A., Section 55).

Appellant further contends that the 1939 amendment to the Federal Employer's Liability Act being

remedial in purpose brings the operations of the Pacific Fruit Express Company under the definition of a "Common Carrier by Railroad" under the terms of the Act of Congress.

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### **SPECIFICATION OF ERRORS.**

1. The District Court erred in holding that the appellee, Pacific Fruit Express Company, and the appellee, Southern Pacific Company, were not employers of appellant as common carriers by Railroad under the Federal Employer's Liability Act at the time of his injury.

2. The District Court erred in holding that it did not have jurisdiction herein.

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### **ARGUMENT.**

#### **SUMMARY OF ARGUMENT.**

1. Appellant contends that the appellee, Pacific Fruit Express Company, was agent for the appellee, Southern Pacific Company, and not an independent contractor, by virtue of the written agency agreement between the appellees, and the right of control therein given appellee, Southern Pacific Company, in the manner in which the work was to be done under the contract, and furthermore by virtue of the Southern Pacific Company's right to supply labor and materials in fulfillment of the contract provisions.

2. Both appellees were engaged in a joint enterprise.

3. The agency contract is in contravention of Section 5 of the act (45 U. S. C. A. 55) as an attempt by a carrier to evade its liability under the Federal Employer's Liability Act.

4. The 1939 amendment to the Federal Employer's Liability Act being remedial and humanitarian in purpose, the Courts should construe the intent of Congress to include the appellee, Pacific Fruit Express Company, as a "Common Carrier by Railroad" under the terms of the Act.

---

#### POINT I.

Appellant contends that the Agency Contract herein gave the appellee, Southern Pacific Company, a right to control the methods used in the refrigeration service by the appellee, Pacific Fruit Express Company, and thus the appellee, Southern Pacific Company, became the master of appellant. It is immaterial whether such control was in fact exercised or not as the authorities hold that where a party has a right of control over the manner in which work is to be done he becomes a master and not an independent contractor.

The Restatement of the Law of Agency reads as follows:

"A master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service."

Section 2: Subsection 1—Restatement on Agency.

“A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right of control of the master.”

Section 2: Subsection 2—Restatement on Agency.

“An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right of control with respect to his physical conduct in the performance of the undertaking.”

Section 2: Subsection 3—Restatement of Agency.

Appellant cannot stress too strongly that he is relying herein upon the right of control given the appellee, Southern Pacific Company, by the terms of the contract. Appellant respectfully submits that the trial judge erred in referring only to an apparent lack of control exercised as distinguished from the inherent right of control over the manner in which the services were to be exercised.

In the case of *Pennsylvania R. Co. v. Roth*, 163 Fed. (2) 161 the United States Government made a contract with the Pennsylvania Railroad to provide storage yards and to furnish labor and material therefor. The railroad company in turn entered into a contract with a contractor who employed Roth, the plaintiff, to unload cars and do other work requested by the railroad incident to the contract. Roth was injured and

the Court held that the control exercised by the railroad and the control which it was given a right to exercise made it the master of the contractor's agent. It is true that in this case the Court was impressed by the actual control exercised by the Railroad but the contract there was replete, as in the case at bar, with terms giving the railroad the right to exercise control.

In the case of *Cimorelli v. New York Central R. Co.*, 148 Fed. (2) 575 the facts are analogous to the case of *Pennsylvania v. Roth* and the instant case. The Government made a contract with the railroad company for a storage and unloading yard, and the railroad then made a contract with the Duffy Co. to do the work and he was required to supply his own equipment and labor. There was a special provision in the contract that the Duffy Co. was to perform the work as an independent contractor with exclusive supervision of the manner and method of its performance, except that the work was to be satisfactory to the railroad company. The Court found that in spite of the terms of the contract the type of work required by the contract must necessarily give the railroad company the right of control and hence the injured employee of the Duffy Co. was the agent of the railroad company and that the contracting Duffy Co. was not an independent contractor.

In *Standard Oil Co. v. Anderson*, 212 U. S. 215 the Court said:

“The master is the person in whose business he (the workman) is engaged at the time, and who has the right to control and direct his conduct.”



In *Singer Manufacturing Co. v. Rahn*, 132 U. S. 518 the Court said:

“The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words ‘not only what shall be done, but how it shall be done’” *Railway v. Hanning*, 15 Wall 649, 656.”

In *Hardaker v. Idle Dist. Council*, 1 Queen’s Bench, 353 the Court said:

“It is the unlimited right of control, whether actually exercised or not, which, in my opinion is the condition for inferring the responsibility of a master.”

The following cases also hold that in determining the distinction between an employee and an independent contractor it is not the actual exercise of control over the manner or means that governs, but the right to exercise it.

*Watkins v. Thompson*, 72 Fed. Supp. 953;

*MacMillan v. Montecito Country Club*, 65 Fed. Supp. 240;

*Ryan v. Farrell*, 208 Cal. 200;

*Wabash v. Finnegan*, 67 Fed. Supp. 94.

It is respectfully submitted that the cases cited by the Judge of the District Court in his opinion can all be distinguished from the facts in the case at bar as those cases all dealt with contracts where the railroad company had no right of control by contract but

merely a right of supervision as to results or to limited control essential to the performance of its functions as a common carrier.

This Honorable Court in analyzing the Agency Contract herein (Tr. of Record p. 54) will perceive that the agreement is replete with clauses and intendments indicating that the appellee, Southern Pacific Company, is the absolute master of the appellee, Pacific Fruit Express Company in that there existed an absolute right of control over the manner in which the contract was to be performed, that the appellee, Pacific Fruit Express Company, was obliged to obey its orders, and that equipment could be furnished by the appellee, Southern Pacific Company, and labor as well. In order to facilitate this interpretation there follows the gist of the pertinent provisions of said contract.

Paragraph 1. Car Line, *as agent of the Railroads*, shall undertake and perform *all* the services necessary to effective refrigeration.

Paragraph 2. Car Line agrees, as agent for the Railroads, to furnish ice necessary for the protection of all perishable freight.

Paragraph 4. Ice at cost to peddler cars and passenger trains.

Paragraph 5. Railroads shall provide car lines with ice at their icing stations or houses whenever required at cost.

Paragraph 6. When Railroads furnish ice to car line at cost.

Paragraph 7. Car Line will make studies re charges, rules and regulations to be published in tariffs of Railroads, and *perform such other* services as may be *required* by the Railroads in regard to preparation and publication of such tariffs.

Paragraph 8. In the performance of the services called for by this contract the *orders* of the (RR) System on whose tracks, loading, unloading, or movement takes place shall be promptly and strictly *obeyed* by the car line.

Paragraph 9. Agents and employees of the Railroads and agents and employees of the car line shall cooperate in every reasonable way with \* \* \* respect to business covered by this agreement.

Paragraph 10. The car line agrees when necessary to furnish the labor required to carry out the provision of this contract. The Railroads agree to have their employees acts as agents for car line in this service.

Paragraph 16. Railroads shall furnish Car Line with telegraph and telephone service over their own wires for the conduct of the business of this agreement.

Paragraph 17. Railroads shall pay the cost of installing and maintaining tracks at ice plants.

Paragraph 18. The ground shall be rented (ice plants) by the Railroads at 6% per annum of value of property—Car Line pays taxes thereon.

Paragraph 19. Car Line can have work done in any department of the Railroads at cost.

Paragraph 20. If Railroad supplies Car Line with tools, supplies or equipment, charge shall be at cost plus 5% for superintendence.

---

POINT 2.

Appellant further advances the theory that in view of the fact that appellee, Southern Pacific Company, owned fifty per cent of the stock of the appellee, Pacific Fruit Express Company (Tr. of Record p. 54), both appellees were at said time engaged in a joint enterprise which would make appellant the servant of both and in support thereof cites the following authorities.

*Oliver v. Northern Pac. Ry. Co.*, 196 Fed. 432;

*Copper River RR Co. v. Heney*, 211 Fed. 459;

*Linstead v. Chesapeake & O. R. Co.*, 276 U. S. 28.

In the *Oliver* case, *supra*, the Court said:

“It will be seen that the Railway Company was the owner of a half interest in the Pullman car upon which the deceased porter was employed, and that the deceased was employed by an association of which the Railroad Company was a part. True, the Pullman Company was the manager for the association, but in that respect it was simply an agent for the Railway Company. Stripped of matters of mere form, the Railway Company and the Pullman Company operated this car jointly for their joint benefit, and employed the porter jointly \* \* \* Is a person employed jointly by a

railway company and another company in the operation and management of a train an employee of the RR. Company, within the meaning of the Employer's Liability Act? In my opinion this question must be answered in the affirmative \* \* \* If such a contract is recognized and given the effect claimed for it by the defendant, there is nothing to prevent Railway Companies from avoiding obligations imposed upon them by this or other laws of Congress \* \* \* Persons employed as the deceased was come within the spirit of the statute and those dependent upon them for support should not be denied the protection it affords."

Appellees blow both hot and cold, for twice on matters of taxation before the Supreme Court of California, the appellee, Southern Pacific Company, has stipulated that it is the alter ego of the appellee, Pacific Fruit Express Company, and that the appellee, Pacific Fruit Express Company, is its agent in the transaction of icing refrigerator cars. In the case of *National Ice Company v. Pacific Fruit Express Company*, 11 Cal. (2) 283, decided in 1938, the Pacific Fruit Express Company took the position that it is the agent of the Southern Pacific Company and is, therefore, not subject to the California State Retail Tax. In the case of *Southern Pacific Company v. McCogan*, 68 Cal. App. (2) 48, decided in 1945, the Southern Pacific Company took the position that it owns fifty per cent (50%) of the stock of the Pacific Fruit Express Company and that the Pacific Fruit Express Company is owned by the Southern Pacific Company in order to further its transportation sys-

tem. This position was taken by the appellee, Southern Pacific Company, in order to resist taxes on its Pacific Fruit Express Company dividends. The California Court at page 80 of the decision stated:

“An examination of the stipuation of facts relating to the businesses of the corporations whose stocks are owned by plaintiff will demonstrate that all but one or two of them are engaged in businesses related to, and most of them directly connected with, plaintiff’s transportation business. Indeed, in the stipulation, they are described as “affiliated companies.” All but one or two of them underlie the transportation business of plaintiff. The Pacific Fruit Express Company, from whom the major portion of the dividends were received, is directly connected with plaintiff’s corporation. It is true that such relationship is based upon contract, but can we be so unrealistic as to believe that the ownership of 50 per cent of that company’s stock by plaintiff, in no way connect the transportation business of plaintiff with that company?”

---

### POINT 3.

The Agency Contract is void as being in contravention of Section 5 of the Federal Employer’s Liability Act (45 U.S.C.A., Section 55) in that by its terms appellee, Southern Pacific Company, in effect evades its liability under the Federal Employer’s Liability Act.

It is respectfully contended by appellant that the Court below erred in dismissing this contention of appellant with the statement that the creation of the Pacific Fruit Express Company antedated the passage

of Section 5 of the Act in 1908. This Court will note that the contract between the appellees is dated July 1, 1942 (Tr. of Record p. 54) and that the date of the contract is germane and not the date of the creation of the Pacific Fruit Express Company. The trial Court stated in its opinion that the record does not disclose any duplicitous design to accomplish evasion of the act. Appellant contends the contract in the record speaks for itself. Paragraph 11 of the contract (Tr. of Record p. 61) states: "The Car Line furthermore agrees to indemnify and save harmless the Railroads against any and all liability for accidents however caused, resulting in injuries to its officers, agents or other employees" and "The Car Line further agrees to save harmless and indemnify the Railroads against any and all such claims whatsoever, growing out of or in any wise connected with such injury or death or loss or damage to persons or property of any of its said officers, agents or other employees".

The Courts have consistently held such a contractual evading of liability void.

*Erie R. Co. v. Margue*, 23 Fed. (2) 664;

*State v. Bates & Rogers Construction Co.*, 157 Pac. 482 (Wash.);

*Moore v. The Industrial Commission of Ohio*, 49 Ohio App. 386, 197 N. E. 404;

In the case of *Erie R. Co. v. Margue*, supra, the Court said:

"This statute, in our opinion, applies to the contract under consideration. The only purpose there could have been, so far as we can see, for inserting into the contract the provision respect-

ing the state Compensation Act, was to substitute the liabilities of that act for those that would have otherwise existed. The liability under the state statute is more certain than at common law or under the federal act, but because of the smaller compensation given by the state act, it would be more economical, from the employer's standpoint, to operate under that act than under any other law, state or federal, that might be applicable. In these circumstances, we have no trouble in believing that the intent of this provision was to evade the force and effect of the federal act, as it was also, perhaps, the main purpose of the contract to evade other federal legislation and control."

---

POINT 4.

Congress by the 1939 amendment to the Federal Employer's Liability Act liberalized and broadened the scope of the Act as to what constitutes interstate commerce and it is respectfully submitted that the Act being remedial and humanitarian in nature the Courts should construe liberally the phrase "common carrier by railroad" so as to include refrigeration car service.

Dated, San Francisco,  
December 20, 1948.

Respectfully submitted,

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No. 12,062

IN THE  
United States  
Court of Appeals

For the Ninth Circuit

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ROBERT H. GAULDEN,

*Appellant,*

vs.

SOUTHERN PACIFIC COMPANY and PACIFIC  
FRUIT EXPRESS COMPANY,

*Appellees.*

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APPELLEES' BRIEF

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FILED

JAN 18 1949

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No. 12,062

IN THE

United States  
Court of Appeals

For the Ninth Circuit

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ROBERT H. GAULDEN,

*Appellant,*

vs.

SOUTHERN PACIFIC COMPANY and PACIFIC  
FRUIT EXPRESS COMPANY,

*Appellees.*

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APPELLEES' BRIEF

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I.

**PRELIMINARY STATEMENT**

Gaulden, an employee of Pacific Fruit Express Company, was injured while working for PFE<sup>1</sup> at its Bakers-

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1. The corporate parties involved are hereafter referred to, as they are referred to in the record, by their familiar initial designations, PFE for Pacific Fruit Express Company, SP for Southern Pacific Company and UP for Union Pacific Railroad Company.

field plant, unloading ice from railroad cars.<sup>2</sup> The pleadings show that he was paid and received compensation under the California Workmen's Compensation Act.<sup>3</sup> He is now attempting to collect under the Federal Employers' Liability Act. On the face of his complaint, and in the proceedings so far had, neither he nor his counsel is quite clear how this can be done. The complaint is a shotgun affair, fired broadside, in the hope that something will be hit. It alleges that each Southern Pacific Company and Pacific Fruit Express Company is a common carrier by railroad engaged in interstate commerce and that "plaintiff was employed by defendant, Southern Pacific Company *or* defendant Pacific Fruit Express Company *or* both of said defendants."

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2. "At the time he was injured plaintiff and other PFE employees were engaged in unloading PFE cars and plaintiff was injured as a result of the movement of said cars by plaintiff and other PFE employees." (R 51). The complaint alleges that he and other employees were moving certain refrigerator cars; that he was ordered behind a refrigerator car "that had been unloaded" to aid the movement of the car by pushing it; that it was to be moved in connection with another car which was moved by a rope and winch; that this other car was loaded with ice; that while plaintiff was pushing the empty car he was run over by the loaded ice car (Complaint Paragraph VII, R 4). This can be taken as true only in so far as admitted in the answer. The admissions are in Part I of the first defense (R 9, 10). The answer admits that plaintiff was an iceman at the PFE ice plant at Bakersfield. "At said time and place plaintiff was engaged in unloading ice from certain refrigerator cars. In the course of said unloading, plaintiff assisted other employees of defendant Pacific Fruit Express Company in pushing a certain empty car, which had just been unloaded, so as to clear the unloading platform for the next car to be unloaded. The loaded car was being pulled up to the unloading platform by a cable and winch."

3. Fifth defense (R 12-14) and plaintiff's (Appellant's) Reply (R 16, 17) filed at the direction of the trial court (R 15).

The California Workmen's Compensation Act is now part of the California Labor Code, § 3201 et seq.

Defendants were served with interrogatories. Objections were filed and a pre-trial conference was had. On the claim of application of the Federal Employers' Liability Act there was a showing of facts and a stipulation. The Court approved the stipulation, made it a part of the order and provided that the order be the Court's order on pre-trial conference (R 19-24).

The stipulation provides that narrative statements attached to it (R 24-75) stand as answers to the interrogatories. They state at some length certain facts. Other facts are covered in Paragraph 3 of the stipulation,—primarily the question of interstate commerce if otherwise the Federal Employers' Liability Act applies. The stipulation provides:

“The issue of application of the Federal Employers' Liability Act (\* \* \*) shall be submitted to the Court for decision on pretrial conference, on the pleadings, this stipulation and the attached statements of fact (\* \* \*) for disposition by the Court.”<sup>4</sup>

The stipulation further provides: “if the Court determines that the Act does not apply it may make appropriate order and judgment disposing of the case,” reserving to plaintiff an exception “if the Court holds that the Act does not apply, and judgment, accordingly, is entered for defendants.” (R 22, 23).

The broad issue is whether there is some magic by which an employee of a “car company,” which provides icing service to common carriers by railroad, because he is

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4. Paragraph 5 further provides that the matter in the narrative statements is deemed to have “been proved by appropriate documentary evidence or a witness competent and qualified to testify.” (R 23).

dissatisfied with the California Workmen's Compensation Act, becomes an employee of a common carrier by railroad under the Federal Employers' Liability Act.

## II.

### **STATEMENT AND DISPOSITION BELOW**

The ultimate facts were determined by the trial court and are stated in its opinion. There is no claim now made of inaccuracy or significant omission. A discussion of every contention made by the plaintiff-appellant followed. Appellant does not attempt to meet it. Indeed, appellant hardly makes the claim that the considerations exposed by the court below do not dispose of this case. Certainly no claim is made that the propositions made are not fully supported by the cases. Rather, the attempt is a partial and inaccurate statement and the citation of cases (one of which at least was disapproved by the court that decided it) dealing with situations wholly different.

The opinion of the trial court is set out in the record at pages 75-87. It is reported in 78 F. Supp. 651. We could rest on it. We shall, however, to some extent amplify (1) to set out conveniently some detail and (2) to correct misimpressions which appellant's brief might convey, particularly of the terms of the contract between SP and UP on one hand and PFE on the other which appellant has "simplified" to the point of being misleading.

## III.

### **ARGUMENT**

#### **A. The Issues.**

Appellant would like to frame the issue. If you can state the question your way you have gone far to have it

decided your way. But the issue cannot be made by the parties. The Congress has made it.

The question is whether the Federal Employers' Liability Act applies. That Act has not left its application in the air. It provides:

“Every *common carrier by railroad*” while engaged in interstate commerce shall be liable to any person injured “while he is *employed by such carrier in such commerce, or, in case of the death of such employee*” to designated beneficiaries.

The basic issues must be:

1. Who is a “common carrier by railroad”?
2. Who is a person “employed by such carrier”,—who is such an “employee”?

As used in the Federal Employers' Liability Act what does the language “common carrier by railroad,” “employed” and “employee” mean?

## **B. Preliminary Propositions.**

Some preliminary propositions will not be disputed:

Unless the Federal Employers' Liability Act applies appellant's only remedy was an application to the California Industrial Accident Commission under the Workmen's Compensation Act (Labor Code).

*Moore v. C. & O. Ry. Co.*, 291 U.S. 205, 78 L.ed. 755;  
*Tipton v. Atchison etc. Co.*, 298 U.S. 141, 80 L.ed. 1091;

*Scott v. Industrial Acc. Com.*, 9 Cal.2d 315, 70 P.2d 940. (Overruling earlier California cases).

Appellant had the burden of showing facts necessary for application of the Federal Employers' Liability Act. He

was aided by no presumption. He takes the risks of all "holes" in the case. What did not appear must be taken against him.

*So. Pac. Co. v. Middleton*, 54 Fed.2d 833 (C.C.A. 5);  
*Robinson v. B. & O. R. Co.*, 237 U.S. 84, 59 L.ed. 849;  
*Cent. Vermont R. Co. v. White*, 238 U.S. 507, 59  
 L.ed. 1433;  
*Hull v. Phila. & R. R. Co.*, 252 U.S. 475, 64 L.ed. 670;  
*Johnson v. S. P. Co.*, 199 Cal. 126, 248 P. 501.

Plaintiff had the burden to show that a defendant against whom recovery was sought owned and operated a common carrier by railroad.

*Bay v. Merrill & Ring Lumber Co.*, 211 Fed. 717,  
 aff'd 220 Fed. 295 (C.C.A. 9), aff'd 243 U.S. 40,  
 61 L.ed. 580.

Appellant undertakes to ground one line of argument on a claim of the meaning and legal effect of a contract. There are rules for determining the meaning and effect of a contract by looking within it—considering the words, the relations of provisions to each other, etc. There are also two important external considerations, (1) the situation of the parties, the circumstances surrounding the making of the contract and the purpose to be served, and (2) the conduct of the parties under it—their "practical construction."

A contract is not a rootless abstraction. It is the agreement of living people to act in a concrete situation. The language is of first importance. But this is the language of the whole agreement, not selected portions in isolation.



The words are relative.<sup>4a</sup> The writing is only a series of symbols for sounds. The sounds have meaning only as usage has related them to things, actions or ideas. Their sense and meaning are not always the same.<sup>4a</sup> The language takes on sense and meaning only as it is known who the parties are, when and where they spoke, with what they were dealing, what problems and solutions presented themselves, and how the matter was ordinarily treated. Since no one knows better than the parties the intention of their language in its concrete application, their conduct, when there were no litigation and no contentions, must always be looked to and, often, is controlling.

“Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs.” (*North German Lloyd v. Guaranty Trust Co.*, 244 U.S. 12, 24, 61 L.ed. 960, 966). “In ascertaining the true meaning of instruments in writing, courts do not confine their attention to single words, phrases, or sentences. The meaning is sought from the whole instrument, viewed in the light of the subject with which it deals.” (*Green County v. Quinlan*, 211 U.S. 582, 594, 53 L.ed. 335, 342; *O'Brien v. Miller*, 168 U.S. 287, 297, 42 L.ed. 469, 473<sup>5</sup>; *Chicago etc. Co. v. Denver etc. Co.*, below, quoted in note 11). “The rules of construction forbid seizing upon some isolated provision of a contract in

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4a. “A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” (Mr. Justice Holmes for the Court in *Towne v. Eisner*, 245 U.S. 418, 425, 62 L.ed. 372, 376.)

5. “The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them.”

order to compel a certain result, and require that the intention be derived from a consideration of the entire instrument. (Civ. Cod., secs. 1641,<sup>6</sup> 1650.<sup>7</sup>)” (*Skookum Oil Co. v. Thomas*, 162 Cal. 539, 547, 123 P. 363; *Estate of Winslow*, 121 Cal. 92, 94, 53 P. 362<sup>8</sup>; *Burr v. Western States etc. Co.*, 211 Cal. 568, 296 P. 273; *Lemm v. Stillwater etc. Co.*, 217 Cal. 474, 19 P.2d 785; 2 *Williston, Contracts*, Rev. Ed., §618<sup>9</sup>).

“The object of construction is to effectuate the intention of the parties in making a given contract. When the contract is in writing, the language used should be interpreted in the light of the circumstances surrounding the parties at the time the contract was made.” (*Sand Filtration Corp. v. Cowardin*, 213 U.S. 360, 364, 53 L.ed. 833, 835; *McCullough v. Virginia*, 172 U.S. 102, 112, 43 L.ed. 382, 386<sup>10</sup>; *Chicago etc. Co. v. Denver etc. Co.*, 143 U.S. 596,

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6. “The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”

7. “Particular clauses of a contract are subordinate to its general intent.”

8. Among the rules controlling the interpretation of contracts “are that the mutual intention of the parties will be given effect so far as the same is lawful and ascertainable from the language employed and the attendant circumstances; that each clause of the contract is to be looked to for light in interpreting the others”.

9. “The writing will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose. The context and subject matter of a contract may show that in a particular sentence an ordinary word has an unusual meaning; or that a word whose meaning, taken by itself, is clear, has been inaccurately used.”

10. A contract, “whatever may be its words, is always to be construed in the light of the statute; of the law then in force; of the circumstances and conditions of the parties.”

609, 36 L.ed. 277, 281<sup>11</sup>; 2 *Williston, Contracts*, Rev. Ed., §618<sup>12</sup>; *Cal. Civ. Cod.* §1647<sup>13</sup>; *Cal. C. C. P.* §1860<sup>14</sup>). Contracts “are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretation which they, by their conduct, have given to the provisions in controversy.” (*Harten v. Loffler*, 212 U.S. 397, 404, 53 L.ed. 568, 573). And so, in construction of a contract, “general words would be restrained by the particular occasion of using them” and “collateral facts and the circumstances in which the parties were placed when the agreement was made, may be given in evidence.” (*The Troy etc. Factory v. Corning*, 14 How. 193, 214, 217, 14 L.ed. 383, 392, 393).

The *Harten Case* pointed out another consideration. Not only must the court look to the factual situation before and at the time the contract was made but it must consider what the parties have done under the contract. “Generally speaking, the practical interpretation of a contract by the

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11. “There can be no doubt whatever of the general proposition that, in the interpretation of any particular clause of a contract, the court is not only at liberty, but required, to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was signed.”

12. “The circumstances under which a writing was made may always be shown. The question the court is seeking to answer is the meaning of the contract at the time and place when the contract was made; and all the surrounding circumstances at that time necessarily throw light upon the meaning of the contract.”

13. “A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.”

14. “For the purpose of construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may always be shown, so that the Judge be placed in the position of those whose language he is to interpret.”

parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence.” (*Old Colony Trust Co. v. Omaha*, 230 U.S. 100, 118, 57 L.ed. 1410, 1417, citing cases; *Dist. of Columbia v. Gallaher*, 124 U.S. 505, 510, 31 L.ed. 526, 527<sup>15</sup>; *Brookman etc. Co. v. Dutcher*, 95 U.S. 269, 24 L.ed. 410, 412<sup>16</sup>; *Rest., Contracts*, §235(e)<sup>17</sup>; 2 *Williston, Contracts*, Rev. Ed., §623<sup>18</sup>; *Cal. Civ. Cod.* §3535<sup>19</sup>; *Long Beach v. United Drug Co.*, 13 Cal.2d 158, 166, 88 P.2d 698<sup>20</sup>; *Union Sugar Co. v. Hollister Estate Co.*, 3 C.2d 740,

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15. “We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a reduction in the contract price.”

16. “The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but hardly less, than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case.”

17. “If the conduct of the parties subsequent to a manifestation of the intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation.”

18. “The interpretation given by the parties themselves to the contract as shown by their acts, will be adopted by the court, and to this end not only the acts, but the declarations of the parties may be considered.”

19. States that “contemporaneous exposition is in general the best.”

20. “Moreover, the construction placed upon the instrument by the parties themselves is persuasive; the law recognizes that the practical construction made by them is cogent evidence of what they intended (citing cases).”

754, 47 P.2d 273<sup>21</sup>; *Lemm v. Stillwater etc. Co.*, above<sup>22</sup>; *Preston v. Herminghaus*, 211 Cal. 1, 11, 292 P. 953; *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 153 P. 951.)

### C. The Facts.

1. SP and UP were disassociated common carriers by railroad<sup>23</sup> (R 24, 25). The general extent of their lines and the general character of their business are matters appropriate for judicial notice<sup>24</sup> (*Ohio Bell T. Co. v. P. U. Com'n.*, 301 U.S. 292, 301, 81 L.ed. 1093, 1100; *Muller v. Oregon*, 208 U.S. 412, 420, 52 L.ed. 551, 555; *Davis v. Farmers etc. Co.*, 262 U.S. 312, 67 L.ed. 996, 998; *Terminal R. Ass'n v. Kimbrel*, 105 F.2d 262 (C.C.A. 8); *Varcoe v. Lee*, 180 Cal. 338.)

SP and UP, together with more than 400 other common carriers by railroad in the United States, provided common carrier by railroad service for the transportation of

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21. Where there was a dispute as to the meaning of a contract the "contemporaneous construction by the parties may be resorted to as the best means of solution."

22. "In viewing the surrounding circumstances of the situation of the parties the court may also call to its aid the event subsequent to the execution of the contract, particularly the practical construction given to the contract by the parties themselves, as shedding light upon the question of their mutual intention at the time of contracting."

23. As will appear below SP and UP were parties to a single contract with PFE. No other relationship between them appears. SP owned no stock of UP and UP was not the owner of record of any stock of SP. If it had any beneficial interest in any stock standing in any other name it was less than 1/10 of 1% of the stock of SP. SP and UP had no common officers or directors (R 25).

24. Both, as common carriers by railroad, were engaged in interstate commerce, subject to the Interstate Commerce Act, its amendments, acts supplementary thereto and acts *in pari materia* therewith and subject to the jurisdiction of the Interstate Commerce Commission (R 24, 25).

“perishables”<sup>25</sup> and in connection with that service made available “protective service” to protect the perishables against the adverse effect of climatic changes or natural deterioration.<sup>26</sup> For this special cars, commonly called reefers,<sup>26</sup> were used and cooling, ventilation or heating service was provided<sup>27</sup> (R 35 et seq.). PFE was one of a number of corporations providing such protective service for American rail carriers.

Under the Interstate Commerce Act (49 U.S.C.A. §6) every common carrier was required to file, print, and keep open “schedules showing all the rates, fares and charges for transportation.” These schedules were required to show, among other things, “all terminal charges, storage charges, icing charges,<sup>28</sup> and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise shall effect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of

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25. “Perishables” are commodities subject to being adversely affected by heat or by cold or by changes in temperature or by natural deterioration unless kept cold (R 35).

26. “Protective service” is a service designed to protect perishables from deterioration due to temperature or natural deterioration and is provided by supplying heater service, ventilator service, and icing and refrigeration service in especially designed and built cars. The commonest type of car was the standard refrigerator car. For this reason these cars are known as “reefers.” (R 35, 37, 43).

27. Neither SP nor UP undertook at any time to provide this service through its own forces and facilities but both before and after the commencement of business by PFE provided such service to others. Before PFE was organized and began business in 1907 they provided this service through contact with third persons. After PFE was organized they provided this service through contact with PFE (R 25).

28. Certain statutes more particularly dealing with protective service are noticed below at pp. 29 et seq.

the service.” In addition it was provided that “no carrier \* \* \* shall engage or participate in the transportation of \* \* \* property \* \* \* unless the rates, fares and charges” have been so filed and published, nor shall any carrier collect or receive greater or less or different compensation for any transportation or incidental service.

There was such a tariff for transportation with protective service—“Perishable Protective Tariff No. 14” and its supplements—to which SP and UP, among more than 400 common carriers by railroad, were parties<sup>29</sup> (R 35, 36). PFE was not a party to that tariff, or any other (R 47). SP and UP in fact made available, on shipper’s written order as required by the tariff, all of the types of protective service specified in the tariff of which there were nine general classifications.<sup>30</sup> The shipper selected and designated the type of service he desired<sup>31</sup> (R 44 et seq.).

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29. The material provisions of the tariff are summarized in the record at p. 44 and following. Operation under it will be commented on below.

30. These included various forms of refrigeration, various types of ventilation service and protective service against cold. Within each of the classifications further variations were possible on shipper’s order. The shipper could designate the character of ice desired, whether crushed, coarse or chopped ice, was entitled to specify that the car be pre-cooled or pre-iced and the amount of salt, if any, to be used, etc., etc. “In short there were various types of protective service available under the tariff, the type of service once specified by the shipper could be changed by the shipper, and within each type of service there were variations which the shipper could specify.” (R 44, 45).

31. The tariff expressly provided the method by which shippers could avail themselves of the services provided (R 36). The shipper “was required to specify to the carrier, in writing, the character of the service desired by the shipper. In addition, the shipper by direction in writing to the carrier, had the privilege, under the tariff, of changing the character of service. \* \* \* The shipper was required to give to the carrier orders in writing as to the character of service desired within the various characters of service permissible under the tariff and the variations of each.” (R 45, 46).

SP and UP, with many of the carriers party to the tariff, did not themselves own the reefers and the facilities for providing the protective service but obtained the car and protective service from various car companies (R 34-36). This practice was expressly provided for in the tariff (R 36).

This general method of providing transportation service for perishables was the method used in the United States for many years long prior to 1939<sup>32</sup> (R 48). In the case of SP this method of providing protective service for perishables through arrangement with third persons antedated 1902 (*Consolidated Forwarding Co. v. S. P. Co.*, 9 I.C.C. 182 decided April 19, 1902, showing that SP contracts with third persons for such service went back at least to 1897). It antedated the organization of and commencement of business by PFE (R 25). PFE was one of a number of such car companies, all of whom conducted their business in the same way<sup>33</sup> (R 34, 48). Its stock was owned by SP and UP (R 31). The matter of the ownership of the stock of such companies by railroads was a well-known and commonplace situation (R 48, 49).<sup>34</sup>

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32. This statement appears in the record at a point following a somewhat detailed description of the business of PFE. This will be outlined below.

33. "Car companies" are companies engaged in the same business as PFE (R 34). Many of the railroads, parties to the Perishable Protective Tariff and providing protective service to shippers, owned no reefers and obtained and provided such railroad service "by arrangement with various car companies in substantially the manner hereinafter described as to PFE." (R 36). The system of car hire, hereafter noticed in describing the business of PFE, "was uniform throughout the United States, applied to all car companies and all common carriers by railroad." (R 40).

34. The "principal car companies providing" protective service, as PFE did, were railroad owned by major common carriers by railroad in interstate commerce and this was "well-known to the Interstate Commerce Commission" and a matter "of general notoriety in the United States." (R 48, 49).



PFE, a Utah corporation, was organized in 1906, qualified to do business in California December 6, 1906 and began business October 1, 1907. **Since it commenced business its business has been substantially the same.** It acquired its facilities from the third persons who had heretofore provided protective service to SP and UP and from other sources.<sup>35</sup> It acquired none of its properties or facilities from SP or UP except as it acquired real property for ice plants and car shops by purchase or lease (R 30, 31).

As we have indicated the business of PFE was substantially the same, and conducted in substantially the same way, as the business of other car companies. The business was in three phases: (a) "car hire"—owning and supplying reefers to railroads, (b) operating shops for repair and rebuilding of equipment and operating ice plants and (c) providing protective service (R 37). PFE owned no cars but reefers and owned no rail motor power except one plant locomotive. It did not own or operate any tracks except shop tracks and plant unloading tracks at icing docks and icing plants. It "did no railroading and performed no railroad operations," car movements being handled by common carriers by railroad (R 41, 42).

The car hire business was what the name implies. PFE owned more than 35,000 reefers. It furnished these reefers to railroads in all parts of the United States and to all lines parties to the Perishable Protective Tariff. "It did not move, or control the handling of, the reefers so furnished" and they were freely interchanged between all of the railroads. For this it charged \$.02 (later raised to

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35. See footnote 27 above.

\$.025) per car mile, loaded or empty. The charge was made to the carrier over whose line the movement was made, in whole or in part, for each mile on that line.<sup>36</sup> This system was uniform throughout the United States and applied to all car companies and all common carriers by railroad. The charge was paid by the carriers. No part of it was paid by shippers and the only charge paid by shippers for use of reefers was unsegregated and included in the line haul tariff of the rail carriers. Any rail carrier upon whose line any empty PFE reefer appeared could, and did, load and use that car in its own service. SP and UP followed this practice with respect to the cars of car companies other than PFE (R 37-41).

The operation of the shops calls for no comment. In these shops PFE repaired its own and reefers of other car companies on the lines of SP or UP or any other railroad so located that the PFE shops could be reached. The owner of the car paid for these repairs (R 42).

PFE manufactured ice and bought some ice from commercial manufacturers (R 43).

PFE provided protective service to common carriers by railroad (SP and UP included) which reached PFE plants by their own lines or where no service from any other rail carrier was required except switching service. It furnished such service to the Santa Fe at Bakersfield and to the Western Pacific at Carlin, Nevada and Modesto, California, and to various railroads at Salt Lake City. It provided the service for its own reefers and those of other car companies (R 43, 44). Covering this service for SP and UP was a written contract, approved by the Interstate Commerce Commission. **PFE had substantially**

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36. See the examples given at pages 39 and 40 of the record.

**similar contracts with other railroads** (R 47). For this service PFE was paid by the rail carriers. Shippers paid it nothing. The shipper paid for the service by making payment to the rail carriers at the tariff rates provided in the Perishable Protective Tariff and made payment to the carrier presenting the freight bill for the line haul service or other appropriate carrier party to the line haul service (R 47).

PFE was party to no tariff. It made no charges to any shipper or other user of facilities of common carriers and had no business revenue except as herein noticed.<sup>37</sup> It issued no bills of lading or other shipping documents. It entered into no agreement with any shipper or other person using the services of rail carriers. All claims for loss or damage were made to the rail carriers and handled by them. PFE had no responsibility for any such claims except as responsibility for its own default was fastened on it by its contract with the carrier<sup>38</sup> (R 47, 48).

This is the method of providing protective service which has been used in the United States for many years long prior to 1939<sup>39</sup> and was the method used by the principal car companies in this country (R 48).

PFE had an icing plant at Bakersfield. Appellant's Brief, quoting from the record but stopping in the middle of a sentence without indicating that the part quoted was not the whole sentence, undertakes to describe this business. This is what Appellant's Brief, p. 4, says: "It

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37. See page 19 below.

38. For the provision of the SP-UP-PFE contract see R 62.

39. This date is significant as the date of amendment of the Federal Employers' Liability Act. See pp. 30 et seq. below.

is a fact that the icing service rendered by PFE under its protective service **contract of July 1, 1942, between it and SP and UP** applied only to SP in regard to the service under said contract by PFE at **Bakersfield** on June 7, 1946 at the time of the accident to plaintiff." That is accurate. That is true of the service "under its protective service contract of July 1, 1942." But that was only the contract between SP and UP. There was other service at Bakersfield. The rest of the sentence goes on: "but it is not true that that was the only icing service rendered by PFE at Bakersfield or that the only icing service rendered by PFE was rendered under said contract, as hereinabove more fully appears." (R 51). And further, on the next page of the record appears the following: "It is not a fact that ice supplied by PFE at Bakersfield, California, was there supplied only to SP but, to the contrary, the same was supplied by PFE to other common carriers by railroad." (R 52). And it further appears that some cars "leaving the PFE plant at Bakersfield \* \* \* were hauled in their first line movement by Atchison, Topeka & Santa Fe Railway Company and/or Sunset Railway." (R 50, 51).

PFE's business was in no sense restricted to business with SP and UP. Nor were UP and SP restricted to the use of PFE reefers. Nor were their contacts in respect of protective service restricted to PFE but extended, as well, to other car companies providing that service (R 46). There was nothing extraordinary or unusual in the relation between SP and PFE. It was standard for all railroads and all car companies.<sup>40</sup>

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40. For a detailed consideration of the contract of July 1, 1942 see page 40 below.

PFE was no hollow shell. In June, 1946 it owned more than 35,000 reefers (R 38). Its net worth was more than \$40,000,000 (R 37). It conducted its car hire business in all parts of the United States and with all railroads. It conducted its other business in Oregon, Washington, California, Idaho, Utah, Nevada, Arizona, Texas, Louisiana, Colorado, Kansas, Wyoming, Nebraska and Iowa. It had car shops at Nampa, Idaho; Roseville, California; Los Angeles, California; Colton, California; Pocatello, Idaho, and Tucson, Arizona (R. 38). "Its income was payments received (1) from common carriers by railroad for car hire of cars, (2) from common carriers by railroad for protective service and (3) from car companies for repair of cars of other car companies." "From its own funds, PFE paid all operating expenses including wages of employees, cost of cars purchased, cost of supplies and materials, cost of plants, cost of power and public services, insurances, taxes, and, where property was leased by it from other person (railroads included), rent." (R 37).

"The PFE business and activities herein described were conducted and directed by its employees." (R 37). Its directors were, of course, elected by its stockholders and had connections with them. But its active operating officers were its own (full time) and had no railroad connection or connection with UP or SP (R 32, 33).

"The PFE business and operations, hereinafter [above] more particularly referred to, conducted and carried on by it were conducted, directed, managed and carried on for it by (a) **its** executive officials and (b) **its** employees as follows: General foreman, shop foremen, carpenters, carmen, carmen helpers, mechanics, mechanic's helpers,

machinists, car laborers, car painters, derrick operators, welders, store clerks, store deliverymen, store laborers, icemen (including plaintiff), ice-pullers, and other men employed in ice manufacturing plants, ice plant managers, icing dock foremen, inspectors and the like. Said employees were all full-time employees of PFE and **none of them were joint employees of PFE and any other firm, person or corporation.** Most (if not all) employees in class (b) above belonged to labor unions (sometimes referred to as Brotherhoods) and PFE had collective bargaining agreements with said unions as the collective bargaining agents of such employees and as to the employees of PFE said collective bargaining contracts were solely between PFE on the one hand and such collective bargaining agent on the other hand and in respect of PFE business and employees. **Said employees in class (b) did their work under the control, supervision and direction of PFE officers and supervisory employees.** None of said employees of PFE were employed under or governed by any collective bargaining agreement or contract to which any railroad or SP or UP was a party. Seniority of the employees of PFE was solely by reason of employment by PFE, prior or later employment of such employee by any railroad or SP or UP had no relation to any seniority with PFE and there was no cross seniority between employees of PFE and employees of any railroad or SP or UP." (R 33, 34).<sup>41</sup>

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41. "No employees of SP were employed or worked at the PFE icing dock, or installations, or plant, or property at Bakersfield, California, except enginemen and switchmen, members of SP yard switching crews, who were full time SP employees and members of SP yard or switching crews switching cars in or out of tracks at said PFE plant, and elsewhere, in and about Bakersfield, Cali-

Plaintiff was an employee of PFE in every normal and usual and ordinary sense of the word employee<sup>42</sup>—in every sense in which it would be used by anybody except a lawyer endeavoring to maintain this action. The complaint concedes that he could be. It certainly makes no forthright claim that he was not<sup>43</sup> (see p. 2 above). The answer admits that he was an employee of PFE and denies that he was an employee of SP or of both SP and PFE (Answer R 9 et seq.). If he had any employment status other than that given by the restricted admission in the answer he had the burden of showing it (pp. 5 and 6 above). Not only is there no such showing but the showing is to the contrary. It was stipulated that he was paid by PFE (R 20) and the record shows: Plaintiff was working as a PFE iceman (R 33) working under the terms of collective bargaining contracts to which PFE was the only employer party (R 34) and working under the supervision of PFE officers and supervisory employees (R 34). No collective bargaining agreement to which any railroad or SP or UP was a party applied and seniority of PFE employees depended solely upon employment by PFE—prior or later employment by any railroad had no relationship to seniority by PFE and there was no cross

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fornia, in the normal course of common carrier railroad service of SP or in the course of a switching move of refrigerator cars or other cars used in the railroad 'protective service' of Atchison, Topeka & Santa Fe Railway Company or Sunset Railway, common carriers by railroad. **There were no employees of SP at Bakersfield, California, engaged in the business of PFE or performing any of its services or acting as its agent.**' (R. 26).

42. This is the sense in which the word is used in the Federal Employers' Liability Act. See page 29 below.

43. The claim of possible joint employment is disposed of by the record, in terms. See pages 19, 20 above and note 41 above.

seniority between employees of PFE and employees of any railroad (see p. 20 above).

#### **D. PFE Was Not a Common Carrier.**

There can be no misunderstanding of the accepted meaning of "common carrier." "A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place." (*The Propeller Niagara v. Cordes*, 21 How. 7, 16 L.ed. 41, 46 col. 1). "A common carrier is generally defined as one who, by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges." (*McCoy v. Pacific Spruce Corp.*, 1 F.2d 853, 855 (C.C.A. 9)). "The carrier may hire his vehicle, or his team, or his servant, for the purpose of transportation; or he may undertake to employ them himself in the act of transporting the goods of another. It is in the latter case only that he assumes the liabilities, and acquires the rights of a common carrier." (*Gracie v. Palmer*, 8 Wheat. 605, 632, 5 L.ed. 696, 703).

Under the Federal Employers' Liability Act the Supreme Court has held that "the words 'common carrier by railroad', as used in the Act, mean one who operates a railroad as a means of carrying for the public—that is to say, a railroad acting as a common carrier," and added that this view "is in accord with the ordinary acceptance of the word." (*Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 187, 65 L.ed. 205, 213).

It is apparent that within "the ordinary acceptance of the words" PFE was neither a railroad nor a common carrier.



If elucidation of "railroad" is required, it will be found in the Act itself. The *Taylor Case* pointed this out not only by the Act's "mention of cars, engines, tracks, road-bed, and other property pertaining to a going railroad" but by its obvious reference to the Safety Appliance Acts and to "the use of similar words in closely related Acts which apply only to carriers operating railroads; and by the fact that similar words in the original Interstate Commerce Acts had been construed as including carriers operating railroads, but not Express Companies" (and we might add car companies, such as PFE, a matter to be enlarged upon below).

The general business of PFE has been stated. It was only that of owning, maintaining and letting reefers and providing protective service for these or any other reefers which reached its servicing plants (R 43 et seq.). It owned only reefers. It owned no rail motive power except one plant locomotive. It neither owned nor operated any tracks except shop tracks and icing dock unloading tracks. It "did no railroading and performed no railroad operations," unless it can be said that its very limited business amounted to railroading and, obviously, within the holding of the *Taylor Case* it did not (R 41, 42).

Nor within any common acceptance of the term was PFE a "common carrier." PFE, neither by virtue of any calling nor as a regular business, undertook to transport commodities from place to place. It performed no transportation services. Such service as was offered was not offered "to such as may choose to employ" it and pay its charges. There was no holding out to the public at all. It offered its services only to common carriers by railroad,

dealt only with them and was paid only by them. Only the common carriers by railroad offered transportation service "to such as may choose to employ" them. Only they received payment of the charges (R 47, 48). Indeed, PFE not being a party to any tariff (R 47) had no tariff charges and under the terms of the Interstate Commerce Act could not legally have collected any or performed any service for any shipper (see §6 of the Interstate Commerce Act, p. 12 above).

It is decidedly in the nature of an anticlimax to state and demonstrate that this has been the holding of the Supreme Court. It has been.

As a preliminary we point out again (see p. 14 above) that the business of all of the car companies is and always has been substantially the same. Not only is this true, from the record before the court, but it will be made apparent by the decisions of the Supreme Court.

*Ellis v. I. C. C.*, 237 U.S. 434, 59 L.ed. 1036 passed upon the question how far the Vice President and General Manager of the Armour Car Lines could be required to answer questions in an investigation conducted by the Interstate Commerce Commission. The holding was that he was not different from any other witness; that the Commission had no enlarged powers because of the character of the Car Lines but, to the contrary, the Car Lines was "not a common carrier subject to the" Interstate Commerce Act; that though the railroads might be answerable for what they hired from the Car Lines "that does not affect the nature of the Armour Car Lines itself." To arrive at this conclusion the court analyzes the business of the Car Lines. Since the Court will read this statement

we do not quote it or summarize it. The statement demonstrates that the business of Armour Car Lines was exactly the business of PFE, conducted in the same way.

The next car company case, *U.S. ex rel. v. I. C. C.*, 265 U. S. 292, 68 L.ed. 1024, must be considered with the *Taylor Case*, p. 22 above. The *Taylor Case* held that an express company messenger, injured while he was working on a train, could not sue under the Federal Employers' Liability Act; that the express company was not a common carrier by railroad; that the contract between the railroad and the express company provided no basis for distinguishing the Pullman porter's case, *Robinson v. B. & O. R. Co.*, 237 U.S. 84, 59 L.ed. 849. The significance of the *Taylor Case* is its holding that the words "common carrier by railroad" in the Federal Employers' Liability Act have the same meaning as similar words in the Interstate Commerce Act and are to be construed to mean only carriers operating railroads (see p. 22, above). The Federal Employers' Liability Act was without significance because Taylor was not an employee of the railroad and the express company was not within the Act. *U. S. ex rel. v. I. C. C.*, decided that a car company, Chicago, New York, & Boston Refrigerator Company, was not a "carrier by railroad," under the Transportation Act of 1920 which made guarantees to carriers and defined carriers as "a carrier by railroad \* \* \* and (2) a sleeping car company." Again the business of the car company was like that of PFE and was conducted in the same way except that the car company had more direct relation with shippers in that it solicited freight and exercised a supervision over the shipment, in some instances issuing bills of lading. We

do not detail the facts because, again, the Court will read them. Arriving at its conclusion the Supreme Court rested on two cases, the *Taylor Case* and the earlier car company case, the *Ellis Case*. The attempt to distinguish the *Taylor Case* because the language there under consideration was in the Federal Employers' Liability Act was rejected because in the *Taylor Case* "the definition was not made to rest upon any peculiarity in the Act under review, but was said to be 'in accord with the ordinary acceptance of the words.' " Of the *Ellis Case* it was said that "the facts \* \* \* were much the same as those in the present case" and, after quoting the *Ellis Case* at some length, the Court goes on:

"It is enough to say that, under the facts, the Car Company is not a carrier by railroad, or, indeed, a common carrier at all, within the ordinary acceptance of the words, and there is nothing in the terms of the Transportation Act which suggests a different view. \* \* \* If the Car Company is a carrier by railroad, it would seem to follow that sleeping car companies and express companies are likewise included within the word. **Evidently, however, Congress did not think so, since §209 of the Act contains two provisions in respect of these companies, which would have been entirely unnecessary if they had been so included.**"

*U. S. v. Fruit Growers Exp. Co.*, 279 U.S. 363, 73 L.ed. 739 held that a railroad owned (R 49) car and protective service company like PFE could not be indicted for violation of the Interstate Commerce Act because it was not a "common carrier." The contention made and sustained was that the car company was one "whose only relation

to a carrier is that of an independent contractor." The Court said, citing among others the *Ellis Case*:

"It was the duty of the common carrier to provide for the icing and also to furnish reports as to the amount delivered in a record kept by it for the information of shippers and of the Interstate Commerce Commission. **But there is no reason why this duty with respect to the furnishing of ice might not be performed by an independent contractor.**"

The *Ellis Case* is again noticed in *General Am. T. Car Corp. v. El Dorado Term. Co.*, 308 U.S. 422, 428, 84 L.ed. 361, 367, where the Court points out that though railroads are under an obligation to furnish special cars "they are not, however, under an obligation to own such cars. They may, if they deem it advisable, lease them \* \* \*. The lessor of such cars to a railroad, however, **is not itself a carrier or engaged in any public service.**"

With these cases, should be read *Reynolds v. Addison Miller Co.*, 143 Wash. 271, 255 Pac. 110, discussed below.

The cases dealing with the analogous situation of employees of the Pullman Company, the *Robinson Case*, p. 25 above, and employees of express companies, the *Taylor Case*, above, go all the way. They necessarily hold that there is no ground for application of the Federal Employers' Liability Act to the employees of any such company upon any theory because both hold that a provision of the contract between the employees and the Pullman Company or the express company, exonerating the railroad from liability in the event the employee is injured, is valid. It could not be if the Federal Employers' Liability Act applied (§5, 45 U.S.C.A. §55) so that the cases neces-

sarily hold that the Act does not apply to the employer, because it is not a common carrier by railroad, and necessarily hold that the employee is not directly or indirectly an employee of the railroad. If he were the Act would apply and strike down the contract.

Another express case, *United States v. American Ry. Exp.*, 265 U.S. 425, 68 L.ed. 1087 should be compared with the *Taylor Case*. Again the problem was the meaning of the term "carrier by railroad." The *Taylor Case* and one of the car cases, *U. S. ex rel. v. I. C. C.* are relied upon and there is a review, particularly in Note 9, of the use of terms in various of the Federal statutes the court pointing out that while many of them including the Federal Employers' Liability Act, use only the term "carrier by railroad," the Twenty-Eight Hour Law of 1906 enumerates in addition to railroads—an obvious recognition of a different and additional category—"express company, car company," etc.

With the *Robinson Case* should be considered another Pullman porter case, *Taylor v. New York C. R. Co.*, 294 N.Y., 397, 62 N.E.2d 777, cert. den. 326 U.S. 786, 90 L.ed. 427. The claim there was that a Pullman porter was a joint employee of the Pullman Company and the railroad. As in the *Robinson Case* the court examined the contract between the Pullman Company and the railroad and held that there was nothing in it to support a contention that the Federal Employers' Liability Act applied.

These holdings have been given Congressional approval and Congress has re-expressed its meaning in parallel legislation. Before turning to this one other matter should be noticed.

### **E. Meaning of "Employed" and "Employee."**

We pointed out (p. 21 above) that plaintiff was an employee of PFE in the normal, usual and ordinary sense of the word. This is the sense which should be taken for the word as it is used in the Federal Employers' Liability Act.

In the *Pullman Case, Robinson v. B. & O. R. Co.*, p. 25 above, the Court said:

"We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act."

This language was approved in *Hull v. Phila. & R.R. Co.*, 252 U.S. 475, 479, 64 L.ed. 670, 673. How the rule has worked in concrete application is shown in a number of cases which are best discussed below.

### **F. Congressional Expressions of Intention.**

The cases so far dealt with have been concerned, of course, with the intention of Congress and to reach that intention made use of other expressions of intention by Congress. But Congress's own expression of intention is entitled to separate consideration because of its expression since those cases were decided. To evaluate these

Congressional expressions one or two preliminary matters need statement.

Some dates of decisions are important. As early as 1902 the existence and general nature of the business of car companies providing protective service was noticed in a published report of the Interstate Commerce Commission (see p. 14 above). In 1912 and 1913 in *Missouri etc. Ry. Co. v. Blalack*, 105 Texas 296, 147 S.W. 559 and *Missouri etc. Ry. Co. v. West*, 38 Okla. 581, 134 Pac. 655 it was held that the Federal Employers' Liability Act did not apply to employees of express companies injured while working on trains. This rule was conclusively established in the *Taylor Case*, pp. 22-26 above, in 1920. Meanwhile in 1915, in the *Robinson Case*, p. 25 above, the same rule was applied to employees of the Pullman Company. In that same year the *Ellis Case*, p. 24 above, held that car companies, providing protective service, were not common carriers by railroad or subject to the Interstate Commerce Act as it then read. In 1916 the *Bond Case*, p. 63 below, held the Federal Employers' Liability Act did not apply to an independent Contractor doing essential railroad work. The holding of the *Ellis Case* was confirmed, in somewhat different circumstances, in 1924 in *U. S. v. I. C. C.* and in 1929 in *U. S. v. Fruit Growers Exp. Co.*, p. 26 above. In 1927, shortly before the last of these cases, *Reynolds v. Addison Miller Co.*, p. 27 above, had held that the Federal Employers' Liability Act did not apply to employees of a concern providing protective service for a railroad.

In the course of these decisions the Supreme Court established that the terms "common carrier by railroad,"



“employee” and “employed” were used in the Federal Employers’ Liability Act in the commonly accepted sense and that “common carrier by railroad” was used in the Federal Employers’ Liability Act in the same sense that it was used in the Interstate Commerce Act (p. 25 above). Secondly, these cases have noticed that the commonly accepted sense of the term “common carrier by railroad” is narrow and confined strictly to a railroad proper acting as a common carrier. Two circumstances indicating this were pointed to. In the *Taylor Case* (see p. 22 above) other provisions of the Federal Employers’ Liability Act were pointed to and it was observed that the reference in Section 1 (45 U.S.C.A. §51) to the “cars, engines, appliances, machinery, tracks, roadbeds, works, boats, wharves, or other equipment” of the “common carrier by railroad” mentioned in that section gave color and meaning to the words “common carrier by railroad.” The second consideration, noticed in *U. S. v. I. C. C.*, quoted at p. 26 above, and *U. S. v. Am. Ry. Exp. Co.*, p. 28 above, was that in related statutes where Congress wanted to deal with some concern which was not a railroad in the strict sense, as a sleeping-car company or an express company, there was no attempt to sweep them within the meaning of “common carrier by railroad” but such concerns were separately and expressly mentioned in terms.

The Acts most closely related to the Federal Employers’ Liability Act, and, indeed, referred to in it (45 U.S.C.A. §§53, 54), are the Safety Acts and the Boiler Inspection Act. The Safety Act of 1893 uses the terms “common carrier engaged in interstate commerce by railroad” (45 U.S.C.A. §§1, 2, 6, 7) and “railroad company” (45 U.S.

C.A. §4). The Safety Act of 1903 (45 U.S.C.A. §8) refers to "common carrier by railroad." The Safety Act of 1910 (45 U.S.C.A. §11, §13) refers to "common carrier subject to the provisions of Sections 1-16" and "common carrier subject to Sections 11-16." Various of the substantive provisions of these Acts refer to locomotives, trains, engineers, brakemen, hauling or moving traffic, "use on its line," receiving from connecting lines, running trains, percentage of power brakes in trains, etc., all indicating that the person subject of the Act is a railroad in the strict sense, being operated as such, and not including any independent third person providing merely accessorial service to an operating railroad. It is made abundantly clear that these statutes, which should have at least as wide application as the Federal Employers' Liability Act, never contemplated application to a business such as that of PFE. The same is to be said of the other statutes which are *in pari materia*. The application of the Locomotive Ash Pan Act of 1908 is to "common carrier engaged in interstate or foreign commerce by railroad" and "common carrier by railroad" (45 U.S.C.A. §17). The Accident Report Act of 1910 (45 U.S.C.A. §§38, 40) is to apply to a "common carrier engaged in interstate or foreign commerce by railroad" and requires reports of "collisions, derailments or other accidents resulting in injury to persons, equipment or roadbed." The Boiler Inspection Act of 1911 (45 U.S.C.A. §22) applies to a "common carrier by railroad."

Meanwhile in 1907 Congress had adopted the Hours of Service Act. It was intended to apply in the same field as that of the statutes just noticed. For this reason its

somewhat different wording is very interesting. By Section 1 (45 U.S.C.A. §61) it is to apply to common carriers "engaged in the transportation of passengers or property by railroad." That "railroad" is a word of confined meaning is indicated by the express provision that as used in this Act it "shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad." If "bridges and ferries" are not included under "railroad" and require separate specification "railroad" **as Congress used the word** is a word of confined meaning and means what it says, a road of rails. Compare the Adamson Eight-Hour Law (45 U.S.C.A. §65) of 1916, which is to apply to "employees" "employed by any common carrier by railroad" actually engaged in train operation.

In contrast are those statutes which Congress intended to apply to concerns other than railroads or common carriers by railroads and the language that Congress used to effect its purpose.

Originally the Interstate Commerce Act applied only to carriers "engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water." To enlarge the jurisdiction of the Interstate Commerce Commission Congress amended this section in 1906 to include express companies, sleeping car companies and pipe lines and in 1910 to include telegraph, telephone and cable companies (*United States v. Am. Ry. Exp. Co.*, 265 U.S. 425, 432, 68 L.ed. 1087, 1092). It did this by expressly enumerating with carriers engaged in transportation of passengers or property by railroad, etc.,

those engaged in transportation of oil or other commodities by pipe line or engaged in the transmission of intelligence by wire and wireless; in terms provided that "common carrier"<sup>44</sup> should include all "pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; **express companies; sleeping car companies**" (49 U.S.C.A. §1). That none of these expressions include a car company or company engaged in giving protective service is abundantly demonstrated by later sub-sections of the same section. Sub-section (10) and following deal with car service and sub-section (14) specifically refers to cars not owned by the carrier using them. This sub-section is of particular interest because of paragraph (b) added to it in 1934 (49 U.S.C.A. §1, Pocket Part) making it "unlawful for any common carrier by railroad \* \* \* to make or enter into any contract, agreement or arrangement with any person for the furnishing to or on behalf of such carrier \* \* \* of **protective service against heat or cold to property transported** \* \* \* until such contract, agreement or arrangement has been submitted to and approved by the Commission." Congress in 1934 expressly recognized the existence of the business of providing protective service through arrangement with third persons—it recognized the existence of PFE and its business—and yet it continues to differentiate it from a common carrier by railroad or any other of the companies specified in Section 1 of the Interstate Commerce Act as subjects of regulation.

With the general provisions of the Interstate Commerce Act which clearly do not cover car companies or protec-

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44. Notice the absence of the words "by railroad."

tive service companies should be compared one section of that Act which does and certain other statutes. By amendment in 1940 (49 U.S.C.A. §20 (6)) the power of the Interstate Commerce Commission to inspect and copy books, accounts, records, etc., was expressly extended to "persons which furnished **cars or protective service against heat or cold to or on behalf of any carrier by railroad.**" This was not the first time that Congress, by express enumeration, dealt with car companies and companies providing protective service. The Railway Labor Act (45 U.S.C.A. §151) adopted in 1926 and amended in 1934, 1936 and 1940 expressly provides that "carrier" "includes any express company, sleeping-car company, carrier by railroad \* \* \* and any company \* \* \* which operates any equipment or facilities or performs any service (other than trucking service) in connection with \* \* \* **refrigeration or icing.**" In 1937 and 1938 there was a series of cognate statutes, the Railroad Retirement Act (45 U.S.C.A. §228a), the Railroad Retirement Tax Act (26 U.S.C.A. §1532), the Carriers Taxing Act (45 U.S.C.A. §261) and the Railroad Unemployment Insurance Act (45 U.S.C.A. §351). They all provide, in the sections noticed, that they apply to carriers, defined to mean "any express company, sleeping-car company, or carrier by railroad" and "any company \* \* \* which operate any equipment or facility or performs any service \* \* \* in connection with \* \* \* **refrigeration or icing.**" It is interesting that under these statutes employees of third persons providing accessorial service such as "employees who put the same ice into refrigerator cars" were employees of the third persons and not of the railroads. (*Northern Pac. Ry. Co. v. Rey-*

*nolds*, 68 Fed. Supp. 492 (Dist. Ct. Miss.); *Penn. R. Co. v. United States*, 70 Fed. Supp. 595 (Ct. of Claims).)

This is the background against which the 1939 amendment of the Federal Employers' Liability Act stands. The purpose of the 1939 amendment of Section 1 (45 U.S.C.A. §51) was definitely and expressly to enlarge the scope of application of the Federal Employers' Liability Act. This was done only by enlarging the definition of interstate commerce and providing that an injured employee need not actually be engaged in interstate commerce at the moment of injury if any part of his duties were the furtherance of interstate commerce. **But the Act still applies only to "employees" of "common carriers by railroad."** In spite of the construction theretofore given to those expressions, the decisions as to the scope of application of the statute as a whole, Congress's knowledge of the existence of organizations engaged in the car hire business and the business of providing protective service and its knowledge, by use, of appropriate expressions for bringing such persons and business within the scope of regulation Congress expressly elected **not** to extend the terms of the Federal Employers' Liability Act beyond common carriers by railroad **as theretofore defined by the Supreme Court**. It elected not to disturb the holding of the *Robinson, Taylor and Reynolds Cases*.

**G. Reynolds v. Addison Miller Co., 143 Wash. 271, 255 Pac. 110.**

The *Reynolds Case* passed upon the point here involved, directly. It holds that an employee of an icing company providing icing service for a railroad, injured while he was doing that work, cannot sue under the Federal Employers' Liability Act. The case is a square holding.

Appellant's brief nicely points out the significance of the *Reynolds Case* by citing *State v. Bates & Rogers Construction Co.*, 91 Wash. 181, 157 P. 482. The *Bates Case* was expressly disapproved by the same court and on the exact point, in the *Reynolds Case*.

In the *Bates Case* the railroad contracted with Bates to repair a railroad bridge. The court held that the contract was not valid under Section 5 of the Federal Employers' Liability Act; that though Bates was an independent contractor, its employees were within the Federal Employers' Liability Act. **This holding (vital to the plaintiff's contention in the principal case) was expressly disapproved in the *Reynolds Case*.**

In the *Reynolds Case* plaintiff was icing cars in these circumstances: Addison and the railroad had made a contract whereby the railroad leased to Addison an icehouse and icing platform.<sup>45</sup> Addison agreed to manufacture, sell,

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45. We got the complete contract involved in *Reynolds v. Addison-Miller Co.*, 143 Wash. 271, 255 Pac. 110 from the Law Department of Northern Pacific Railway Company, the railroad involved and set out its principal provisions in a supplement brief in the court below. If any question were to be made the transcript of record in that case was available. Our statements were not questioned.

The contract was dated October 23, 1924, was between the railway company and Addison-Miller, Incorporated, and dealt with icing at Pasco, Washington. It had a provision substantially like paragraph 8 in the contract here in question (see below, p. ....). In Part IV it provided that the contractor would provide ice in the bunkers of all refrigerator cars set by the Railway Company "when and as called for by it," and:

"Icing of cars by the Contractor shall be performed in accordance with such instructions as may be issued from time to time by the Railway Company covering methods to be used in placing ice in the bunkers of cars. \* \* \* At any time that the Railway Company shall require salt to be used in the bunkers of refrigerator cars, and shall furnish an adequate supply thereof for that purpose, the Contractor shall place salt in the bunkers of refrigerator cars as directed."

and deliver in the bunkers of all refrigerator cars which the railroad might set out at the icing platform, all the ice that was required for use by railroad. The railroad had the right to inspect the work performed by Addison. Plaintiff was injured icing a car. Action was brought under the Federal Employers' Liability Act. Defendants' motion for a directed verdict was granted. A new trial was granted. On appeal this order was reversed with direction to enter judgment for defendants.

The Court held that Addison was not a common carrier by railroad, was an independent contractor and the employees of Addison were not the employees of the railroad. The Court discussed the leading U. S. Supreme Court cases and other cases in support of its conclusion. In respect of the *Bates Case* the Court said:

"The respondent, however, cites us to one opinion of this court from which he derives comfort, and which, it must be admitted, contains language—**unsupported, however, by any citation of authority—**

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Part IX provided that the contractor should comply with all requirements of the Workman's Compensation Act and "at all times fully indemnify and save the Railway Company harmless from all claims and causes of action by employees of the parties hereto or third persons, on account of personal injuries, death or damage to property." (Compare this with similar hold harmless clause in the SP-UP-PFE contract.) Part X provided that the Railway Company should furnish free transportation of all material and equipment necessary for plant construction and the production of ice and free transportation for employees. Part XII provided that the contractor would favor the railroad when it was having transportation done.

The opinion in the *Reynolds Case* reviewed the contract and said of it that the contractor was to furnish labor and had exclusive power of directing its employees as to their duties and the time and place where they should perform them, "the Railway Company having no authority in any manner over such employees." There was no express provision in the contract to this effect. This is the court's holding of its legal effect.



which would indicate that the respondent had a right to maintain this suit. That language was not necessary to the decision of the case and, as already said, was unsupported by authority, and in fact is contrary to what is practically the unanimous decisions of all the courts which have considered this question. The case referred to is *State v. Bates & Rogers Construction Co.*, 91 Wash. 181, 157 P. 482, \* \* \*. This dictum cannot be supported either upon reason or authority, and has never been followed by this court."

The *Reynolds Case* factually is on all fours with the principal case. It is a square holding against the plaintiff, and is abundantly supported by "practically the unanimous decisions of all the Courts which have considered this question," including those of the United States Supreme Court.

#### **H. Appellant Was Not Engaged in Any Work to Provide Service for SP.**

PFE provided protective service at Bakersfield for SP, Santa Fe and Sunset. In order to perform this service, at times, it moved ice from other points to Bakersfield by railroad (R 43). To handle this ice when it arrived it had an unloading track held by it under lease. The switching of the cars into this track was done by SP. PFE performed no railroad operations. All the switching was done by SP (R 50).

The ice being handled "by the plaintiff and his fellow employees at Bakersfield, California, on or about June 7, 1946" was such ice, hauled to Bakersfield to be available for any service that PFE might furnish, whether to

SP, Sunset or Santa Fe. In fact, the very cars in question, on their first revenue trip moved over the line of Santa Fe (R 50). No protective service was being provided. No ice was being put into a car. Ice was being unloaded. The movement of the cars, by cable and winch, a non-railroad method of movement, was a mere incident to PFE's own activity in unloading the ice. Neither plaintiff nor PFE were acting for SP or providing any service to it or any of its shippers, whether as agent, independent contractor or otherwise. Plaintiff and PFE were no more acting for SP than they were for Santa Fe. Any contract with SP had no more relation to what was being done than a contract with Santa Fe or Union Pacific or Western Pacific or Sunset.

#### IV.

#### REPLY TO APPELLANT'S POINTS

##### A. The "Protective Service Contract" of July 1, 1942.

Plaintiff seems to think that the protective service contract of July 1, 1942 distorts the considerations so far noticed. It is gravely to be doubted whether plaintiff can take advantage of it. As, in *Hull v. Phila. & R.R. Co.*, 252 U.S. 475, 489, 64 L.ed. 670, 673 (see below), "he was not a party to the agreement between the" railroads and PFE "and is not shown to have had knowledge of it" but, as in that case, we pass this, for, as said there, "assuming the provisions of the agreement can be availed of by petitioner, it still is plain, we think, from the whole case," that for all purposes he was an employee of PFE.

The contract of July 1, 1942 (R 47, 54-75), superseded "as of that date the agreement between the parties hereto dated July 1, 1936" (par. 26, R 68). But this worked

no change in the way the business was conducted. "The business conducted by PFE since the commencement of business by it was substantially its business" described above (R 30). It was the same business conducted by "a number of corporations in the United States engaged in the same line of business." (R 34). Its method "of providing reefer service and railroad protective service had been used in the United States for many years and for many years long prior to 1939 and while PFE was conducting its business as aforesaid" (R 48). The contract "was approved by the Interstate Commerce Commission" and "PFE had substantially similar contracts with other railroads." (R 47).

It is against this factual background that the contract must be considered (see p. 8 above). It did only what would be expected in the circumstances. This Court, if called upon, could and would draw a substantially similar contract. We give its main outlines first and then turn to those portions on which appellant seems to rely.

The contract makes careful distinction between employees of PFE and those of SP and UP. See paragraphs 10, 11, 21. The parties did not treat the employees of PFE as railroad employees nor railroad employees as those of PFE.

These, in general, are the obligations of PFE: It is to provide all "services necessary to the effective refrigeration, and/or heating" which the railroads are required to furnish and to furnish the necessary ice and heating appliances and fuel (pars. 1, 2) for which it is to be paid as provided in Appendix B (par. 3). In addition it is to provide ice and heating for L.C.L. shipments and for certain

other railroad purposes being paid the cost<sup>46</sup> of the ice and in the case of the heating "a proper charge" (pars. 4, 22). PFE is "to furnish the labor required" except that at stations where this is impracticable and the service is not regularly required and it can depend on the railroad "for temporary labor assistance" the railroads agree to have their employees act for PFE and the railroad to be reimbursed "for all expense incurred thereby" (par. 10).<sup>46a</sup> In addition PFE is to provide and maintain at its expense necessary "fixed properties," if ground is furnished by the railroads an appropriate rental shall be paid and it is to provide tracks for loading and unloading ice although the railroads will provide the tracks necessary for the icing of cars en route or preicing (pars. 17, 18). PFE will make studies concerning charges, rules and regulations (par. 7) and there is further provision for the keeping of records and making of settlements (pars. 21, 23).

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46. Cost is defined in Appendix B as including "production cost, maintenance and running expenses of ice plants, storage houses, icing platforms, cost of ice purchased, freight charges at company-material rate of five mills per ton-mile for transportation of ice, and a proper proportion of general expenses" and in addition **"a return at the rate of 6 percent per annum on the value of property of the Car Line employed, depreciation at the rate of 4 percent per annum on the book cost of such property subject to depreciation, and applicable taxes."**

46a. The provision is that "at stations where it is impracticable or undesirable to employ a regular icing force or special employees, and the furnishing of ice or the inspection of cars moving under refrigeration or heater service is not regularly required, but where for the expeditious handling of freight the Car Line may be dependent upon the Railroads for temporary labor assistance, the Railroads agree to have their employees, acting as agents for the Car Line, promptly perform the necessary service for the Car Line." (Par. 10). This is an exception to the general provision of the same paragraph that "the Car Line agrees when necessary to furnish the labor required to carry out the provisions of this agreement for the refrigeration and/or heating of cars."

In return the railroads, in addition to making the payments specified, will: Supply PFE with ice where the railroads have a surplus, being paid at cost (pars. 5, 6); furnish labor where it is impracticable for PFE to maintain a force and, where permitted to, will supply transportation and telegraph and telephone service, with certain provisions for compensation (pars. 15, 16); will perform services for PFE in various departments of the railroads at cost "plus usual percentages" (par. 19) and if they supply tools, supplies, appliances, material or equipment will be paid cost at the point where supplied "plus five (5) percentum" (par. 20).<sup>47</sup>

There are provisions for indemnity in the event of injury to persons or property (par. 11) and adjusting responsibility for damage to freight (pars. 12-14).

As would be expected it is provided that the employees of the railroads and of PFE will cooperate and exchange information (par. 9), that PFE will perform under the contract "without unjust discrimination against or undue favor to" either railroad "or any shipper" and that since the shippers are entitled to select the type of service available to them under the tariff and give orders to the railroads as to the type of service desired (see p. 13 above), in the performance of its service PFE will promptly and strictly obey the orders of the railroad on whose tracks the loading, unloading or movement takes place (par. 8).

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47. These provisions are normal. They provide a method by which PFE can obtain necessary facilities at points remote from points of supply and where the only person available to supply the facilities and materials is one of the railroads. These provisions are not that the railroad shall supply tools or services or facilities but merely that if it does this shall be on a cost-plus basis (see pars. 19 and 20).

There is nothing here which changes the legal effects which flow from the way the business was in fact conducted. There is nothing which could be added or taken away, agreeably to the method of doing business, which would change the result. There is nothing which could fairly be omitted. In short the contract provided merely what service was to be provided, how it was to be paid for, that proper records be kept, adjustments for losses be made, the parties cooperate and PFE provide that type of service available under the tariff which the shipper ordered.

It is suggested that SP controlled, or had the right to control, the way PFE conducted its operations. The first thing is that the situation of SP was not different from that of UP. In actual fact PFE conducted its own business through its own employees, employed by it under collective bargaining arrangements made between it and the Brotherhoods, and its operations and the work of its employees was directed by its own full-time officers (see p. 19 above). Its method of business was that which had been common in the United States for many years (R. 48) and its contract here noticed was substantially the same as contracts it had with other railroads (R. 47). There is nothing in that contract which gave SP or UP or both any right of control of the way PFE handled its business. The only possible provision from which this could be argued is paragraph 8.

Paragraph 8 simply provides that in rendering service PFE shall not discriminate and that in performing the service "the orders of the System on whose tracks loading, unloading, or movement takes place shall be promptly

and strictly obeyed by the Car Line." This is in no sense restricted to SP and UP or both. But the more important aspect is that it does no more than make provision for coordinating PFE service with railroad service to the end that the railroads can provide to their shippers **such services as the shippers order** and as are available under the tariff (see p. 13 above and R 44 et seq.).

"In short there were various types of protective service available under the tariff, the type of service once specified by the shipper could be changed by the shipper, and within each type of service there were variations which the shipper could specify. The shipper was required to give the carriers orders in writing as to the character of service desired \* \* \* SP or UP, on receipt of the shipper's orders \* \* \* transmitted these by orders to PFE and PFE then complied with said orders and furnished the character of service ordered. **In the performance of protective service no other orders were given by SP or UP to PFE except such orders, and such orders were only as to the character of service ordered by the shipper, such orders were only as to the result to be furnished to the shipper and neither SP nor UP gave PFE orders as to how PFE should accomplish the result of providing the type of service ordered by the shipper. \* \* \*** In this regard there was no distinction between the orders for performance of protective service given by SP to PFE in respect of cars on SP lines and orders given by SP to other railroads, car companies or other third persons in respect of cars originating on SP lines but off SP lines at the time the order was given." (R 45-47)

Provision for such orders, necessary for the coordination of the activities of the railroad and PFE, gives no

base for the argument that PFE is a common carrier by railroad or that the Federal Employers' Liability Act applies (see cases below and compare *Norfolk & W. Ry. Co. v. Hall*, 57 F.2d 1003 (C.C.A. 4), *Mo. etc. Co. v. Blalock*, 105 Tex. 296, 147 S.W. 559 and *Mo. etc. Co. v. West*, 38 Okla. 581, 134 Pac. 655). The *Robinson Case*, p. 25 above, expressly noticed that "the railroad company had the control essential to the performance of **its** functions as a common carrier" and that to this end Pullman employees "were bound by the rules and regulations of the railroad company." But this did not make the Federal Act applicable. Another Pullman case, the *Taylor Case*, at p. 28 above, reached the same result although it was noticed that "the Pullman Company employees to some extent furthered defendant's purposes and cooperated with its own employees." The line which the *Bond Case*, p. 63 below, used applies:

"There was, it is true, and necessarily, a certain direction to be given by the company, or rather, we should say, information given to Turner. But the manner of the work was under his control, to be done by him and those employed by him. \* \* \* The power given was one of control in a sense, **but it was not a detailed control** of the actions of Turner or those of his employees. It was a judgment only over results and a necessary sanction of the obligations which he had incurred. It was not tantamount to the control of an employee and a remedy against his incompetence or neglect. The whole instrument shows system and particular care. It is not the engagement of a servant submitting to subordination and subject momentarily to superintendence, but of one capable of independent action, to be judged of by its results.



\* \* \* The railroad company, therefore, did not retain the right to direct the manner in which the business should be done, as well as the results to be accomplished, or, in other words, did not retain control not only of what should be done, but how it should be done.”

Two cases provide interesting comparisons in view of the very broad construction given to the conception of employee under the Social Security Act, *United States v. Silk*, 331 U.S. 704, 91 L.ed. 1757 and *Bartels v. Birmingham*, 332 U.S. 126, 91 L.ed. 1947.<sup>48</sup>

There are other provisions of the contract utterly inconsistent with a construction which would make paragraph 8 say that the railroads had a right to control the details of how PFE went about its business. Paragraph 9 provides that agents and employees of the railroad and agents and employees of the car line shall cooperate and exchange information. This would be utterly unnecessary if the railroads were in control of PFE operations and could themselves direct the detail of activity of those persons separately classified in the contract as “agents and employees of the car line” in contradistinction to “agents and employees of the railroad.” So the express provision of Paragraph 10 that the car line would furnish the necessary labor would be useless and meaningless. So the provision of Paragraph 18 that the car line would provide necessary equipment. If the railroads were in complete control they could order such equipment pro-

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48. Contract between a band leader and a dance hall expressly provided that the dance hall operator should have complete control of the services of the employees.

vided without any special provision in the contract. So the provisions of Paragraph 21 for keeping complete records.

Finally appellant attempts to seize on those provisions of the contract stating that the services preformed by PFE it shall perform "as the agent of the railroad." The obvious purpose of the provision is to make it clear that PFE's only relationship shall be with the railroads and that it is not acting directly for and in relationship with the shippers.

The word "agent" and "agency" connote no such confined and restricted class of relationship as appellant seems to have in mind but are of a very wide meaning and describe a great variety of relationships.<sup>49</sup>

"Agency" contemplates three distinct relationships: (1) principal and agent, (2) master and servant, and (3) employer or proprietor and independent contractor. (*Mechem Agency*, 2 ed. §1 et seq., especially §§4, 8, 25, 40 and §§1870, 1871, 1917-1920). The *Restatement, Agency*, §1 and Comment C recognizes this threefold distinction<sup>50</sup> (see

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49. National banks are spoken of as agencies of the United States (*Posadas v. Nat. City Bk.*, 296 U.S. 497, 500, 80 L.ed. 351, 354; *First Nat. Bk. v. Marion Co.*, 169 Or. 595, 130 P.2d 9, 10). A bank may act as an agent for one of its customers (*Hill v. Citizens etc. Bk.*, 9 Cal.2d 172, 69 P.2d 853). But the employees of the bank are its employees alone; they are not employees of the government or of the customer. The bank is not a mere servant—using that word in its technical common-law sense—so that whoever engages its services makes its employees his employees. So it is common to speak of people engaged in independent callings on their own account, with their own employees, as sales agencies (*Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 P. 289; *Fuller v. Hindenbaum*, 29 C.A.2d 227, 84 P.2d 155).

50. On the general subject, of many of the cases noticing the Restatement, the following may be consulted: *Hurla v. Capper Publications*, 194 Kan. 369, 87 Pac.2d 552; *Courier Journal v. Akers*, 295 Ky. 745, 175 S.W.2d 350; *Henkelmann v. Metro etc. Co.*, 180 Md. 591, 26 Atl. A.2d 418; *Western Ind. Co. v. Pillsbury*, 172 Cal.

*Groton v. Doty*, 57 Idaho 792, 59 P.2d 136, 139 and *Ryan v. Wisconsin Dep. of Tax.*, 242 Wis. 491, 8 N.W.2d 393).

“The term ‘agency’ is a broad one and may include every relation in which one person acts for another. It is frequently used in connection with an arrangement which does not in law amount to an agency, as where the essence on an arrangement is bailment or sale, as in the case of a sale agency exclusive in certain territories.”

*State etc. Fund v. I.A.C.*, 216 Cal. 351, 114 P.2d 306.

The question is not whether one was an agent **but what sort of an agent** he was. (*Great Am. Ind. Co. v. Fleniken*, 134, F.2d 208 (C.C.A. 5), cert. den. 219 U.S. 753, 87 L.ed. 1706, reh. den. 319 U.S. 785, 78 L.ed. 1728.)

The relationship of PFE and SP is to be determined by the facts—by the provisions of the contract as to what is to be done and by the facts and acts of the parties under the contract. The fact controls, not some characterization of it. (*Bessing v. Prince*, 52 Cal. App. 190, 193, 198 P. 422<sup>51</sup>; *State Finance Co. v. Smith*, 44 Cal. App.2d 688, 692, 112

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807, 159 Pac. 721; *Kourik v. English*, 340 Mo. 367, 100 S.W.2d 901, 905; *Ellis v. Associated etc. Corp.*, 24 F.2d 809 (C.C.A. 5), cert. den. 278 U.S. 649, 73 L.ed. 561. And, of course, there should be considered the cases where one is actually providing carrier service for another as in the *Grayvan Case* reported with *United States v. Silk*, the *Seas Shipping Co. Case* and the *Magruder Case* (discussed below) and where accessorial service is provided as in the *Pullman* and *Express Cases*. To these should be added one other case. In *Soderberg v. Atlantic etc. Corp.*, 19 F.2d 286 (C.C.A. 2), cert. den. 275 U.S. 542, 72 L.ed. 416 the Cunard Company employed Funch Edye & Co. “as the ship’s agent.” They in turn employed Atlantic L. Corp. to lade the ship. The latter was guilty of negligence. Held, that the Cunard Company was not liable.

51. “Although the contract began with the statement that respondent appointed appellant as his agent, the contract as a whole shows that it was not a contractive agency \* \* \*.”

P.2d 901<sup>52</sup>; *J. R. Watkins Medical Co. v. Williams*, 124 Ark. 539, 187 S.W. 653, 655 col. 2<sup>53</sup>; *Eckerd v. Merchants Shipbuilding Corp.*, 280 Pa. 340, 124 A. 477, 479 col. 2<sup>54</sup>; 2 *Am. Jur.* 27 (Agency §24).<sup>55</sup>)

In further considering this point it is convenient to consider with it three cases which appellant cites for the proposition that SP and PFE were engaged in a joint venture.

Of course, a railroad if it elects to, may itself, with its own employees, provide icing service. But it is not required to and may employ an independent contractor (see the *Fruit Growers Exp. Case*, p. 26 above and compare the *El Dorado Case*, p. 27 above). If it elects to have this service provided by a third person the employees of that third person do not fall under the Federal Employers' Liability Act (the *Reynolds Case*, p. 36 above). We shall have occasion to return to this general consideration again and respectfully call attention to the cases dealt with under sub-head B below.

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52. A writing purported to make one person the agent of another but the court looked to the facts, found them "opposed to the terms of this agreement" and held that an agency was not created.

53. "In a great many places in the contracts, correspondence, and advertising matter, appellee and others similarly employed are referred to as agents; yet, of course, that designation is not controlling."

54. "The contract between the two companies calls the defendant the agent of the Fleet Corporation. This of course does not determine the matter."

55. "If an act done by one person in behalf of another is in its essential nature one of agency, the former is the agent of the latter, notwithstanding he is not so called. On the other hand, the mere use of the word 'agent' by the parties in their contract cannot be held to have the effect of making one an agent who, in view of the law under the evidence, is not such."

*Oliver v. Northern Pac. Ry. Co.*, 196 Fed. 432 was a direct employment case. The decedent was a sleeping-car employee. The sleeping cars involved were **jointly owned and operated** by the railroad and the Pullman Company. The holding is simply that a person "employed jointly by a railroad company and another company in the operation and management of a train" is an employee of the railroad company under the Act. In the *Robinson Case*, 237 U.S. 84, 59 L.ed. 849, where "the case was not one of co-proprietorship," as in the *Oliver Case*, the Supreme Court reached a contrary result. For other sleeping-car company employee cases in addition to the *Robinson Case* and *Taylor Case* (p. 28 above—not the Express Company *Taylor Case*) see *Lindsay v. Chicago etc. Co.*, 226 Fed. 23 (C.C.A. 7), *Fowler v. Penn. R. Co.*, 229 Fed. 373 (C.C.A. 2) and *Eubanks v. So. Ry. Co.*, 244 Fed. 891. Compare the express company employee cases, p. 30 above.

In *Copper River etc. Co. v. Heney*, 211 Fed. 459, the Copper River Company owned a railroad and was a common carrier. The Katalla Company was its subsidiary and the evidence showed that the subsidiary was actually operating the railroad. It transacted the business of the road, issued its own bills of lading and tickets and these stated that it was operating the railroad. Its resident engineer was unable to say who was operating. It was held that the Katalla Company was a common carrier by railroad. No other holding was possible in view of the express provision of the Federal Employers' Liability Act (45 U.S.C.A. §57) that the term "common carrier" as used in the Act includes all "persons or corporations

charged with the duty of the management and operation of the business of a common carrier." And the court expressly put its decision on this ground. The case can have no application here. PFE was not operating any railroad.

*Linstead v. C. & O. R. Co.*, 276 U.S. 28, 72 L.ed. 453, simply applied under the Federal Employers' Liability Act the well-established rule governing the relation of a special servant to a special master. The case simply involved "the legal consequences of the relation between one in the general service of another who is in the special service of a third person." An employee in the general employment of one railroad was lent to another railroad—he was transferred to the special employment of the second railroad doing **its** business **for it** as **its** servant. The case has no application to an employee who is about his own master's business for his own master even though he may be doing that business on the line of a railroad. This is demonstrated by the Pullman and express cases. It is further demonstrated by *Hull v. Phila. & R.R. Co.*, 252 U.S. 457, 64 L.ed. 670 and the line of distinction is recognized by the *Linstead Case* itself for it distinguishes the *Hull Case* on this ground. In the *Hull Case* the Maryland Company and the Reading Company were connecting carriers, the Maryland Company operating from Hagerstown to Lurgan and the Reading Company from Lurgan to Rutherford. In actual operation, however, the Maryland Company operated its trains from Hagerstown through to Rutherford with its own crews. While on the rails of the Reading Company these Maryland crews were subject to the Reading Company operating rules. They were

nevertheless employees of the Maryland Company not the Reading Company. The court in the *Hull Case* pointed out that Hull had not been transferred from the employ of the Maryland Company and was its employee only.

"It is clear that each company retains control of its own train crew; that what the latter did upon the line of the other road was done as part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline, and orders, **this was for the purpose of coordinating their movements** to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies."

This last thought was also expressed in the *Robinson Case* (the Pullman case), 237 U.S. 84, 59 L.ed. 849, where the court said:

"The service provided by the Pullman Company was, it is true, subject to the exigencies of railroad transportation, and the railroad company had the control essential to the performance of its functions as a common carrier. To this end the employees of the Pullman Company were bound by the rules and regulations of the railroad company. **This authority of the latter was commensurate with its duty, and existed only that it might perform its paramount obligation.**"

Cf. *Stevenson v. Lake Terminal R. Co.*, 52 F.2d 357 (C.C.A. 6)<sup>56</sup>;

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56. Like the *Hull Case*. The plaintiff had been employed by the defendant. Its tracks connected with the plant tracks of National Tube Company. The latter owned plant locomotives and did switching on its own plant tracks. Occasionally in doing this it was neces-

*Docheney v. Penn. R. Co.*, 60 F.2d 808 (C.C.A. 3)<sup>57</sup>;  
*Chicago etc. Co. v. Wagner*, 239 U.S. 452, 60 L.ed.  
 379<sup>58</sup>;

*Douglas v. Washington Terminal Co.*, 298 F. 199  
 (C.A. of D.C.)<sup>59</sup>;

*Kentucky etc. Co. v. Minton*, 167 Ky. 516, 180 S.W.  
 831.<sup>60</sup>

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sary for it to make movements over the defendant's main line. The plaintiff had been in the employ of the railroad company but in 1922, with other employees, was transferred to the employ of the Tube Company. While doing switching for it he was injured, as he claimed by reason of violation of a Safety Appliance Act, while on the defendant railroad's tracks and during the course of a move in which one of its engines had been lent to the Tube Company. *Held*, that he could not maintain an action against the railroad. Many of the cases with which we deal are discussed and it was held that the case was controlled by the *Hull Case*. The *Linstead Case* was distinguished. "In that case the work done was that of the defendant railroad, for which it was paid according to the standard tariffs." Again, the result was reached **although "the train, while on defendant's tracks, was subject to the orders of defendant's train master as to signals for proceeding and the like."**

57. On facts very like those in the *Stevenson Case*, the court distinguishes the *Linstead Case* and holds that the *Hull Case* is controlling.

58. *Held*, that a Burlington conductor could not be treated as an Alton employee because he was moving cars over Alton tracks under an arrangement between Burlington and Alton, on the authority of the *Robinson (Pullman) Case*, 237 U.S. 84, 91, 59 L.ed. 849, 851.

59. A terminal company switchman was killed in the course of switching moves on terminal company tracks. The Pennsylvania was one of the railroads using the terminal. The switching was of one of its trains and the locomotive making the move was a Penn locomotive handled by Penn enginemen. It was claimed that they were negligent. But they "were acting in the service and employment of the Pennsylvania Railroad, and not as employees of the Washington Terminal Company, although necessarily observing the signals and regulations of the latter company for the concurrent use of the station by the various companies."

60. *Held*, that the K. Ry. Co. could not be held under the Act for an injury received by an employee of the C. Co. while he was inspecting cars brought in by the K. Co. because he was not an employee of the latter.



A common carrier by railroad can, of course, employ independent contractors to perform various acts necessary for the operation of the railroad or to provide accessorial service to shippers and passengers as in the case of express matter or sleeping accommodations. Even where a railroad is under a duty to the public to do certain things and must see that they are done if it employs an independent contractor the employees of the independent contractor are not its employees. The railroad's duty to the public to see that a result is accomplished, where the public is not concerned with the way in which it is accomplished but merely that it is accomplished, must not be confused with the relation between the railroad and an independent contractor and the employees of the latter where the railroad elects to use an independent contractor instead of accomplishing the result with its own forces. The distinction between the carrier's duty to the public and its relation to an employee of an independent contractor performing some service for it was pointed out in the *Robinson (Pullman) Case*. The court noticed Section 5 of the Federal Employers' Liability Act and went on:

"The application of this provision depends upon the plaintiff's employment. For the 'liability created' by the Act is a liability to the 'employees' of the carrier, and not to others; and the plaintiff was not entitled to the benefit of the provision unless he was 'employed' by the railroad company within the meaning of the Act. It will be observed that **the question is not whether the railroad company, by virtue of its duty to passengers, of which it cannot divest itself by any arrangement with a sleeping-car company, would not be liable for the negligence of a sleeping-car porter in matters involving the passengers' safety**

(*Pennsylvania Co. v. Roy*, 102 U.S. 451, 26 L.ed. 141). Nor are we here concerned with the measure of the obligation of the railroad company, in the absence of special contract, to one in the plaintiff's situation by reason of the fact that he was lawfully on the train, although not a passenger. **The inquiry rather is whether the plaintiff comes within the statutory description;** that is, whether, upon the facts disclosed in the record, it can be said that within the sense of the Act, the plaintiff was an employee of the railroad company, or whether he is not to be regarded as outside that description, being in truth, on the train simply in the character of a servant of another master by whom he was hired, directed, and paid, and at whose will he was to be continued in service or discharged."

The same line of distinction was made in the *Magruder Case*, p. 64 below, where the court pointed out that the liability of a company undertaking to provide taxicab service to its passengers, in case of injury to the passenger, was wholly distinct from the question whether as between the company and the driver of the cab the driver was an employee or not. Compare, on the same general line of question, but not a common carrier case, *Bowman v. Pace Co.*, 119 F.2d 858 (C.C.A. 5). Of course, icing of railroad cars is a line of work for which an independent contractor can be employed (see *Fruit Growers Exp. Co.*, p. 26 above). And, indeed, a railroad may employ an independent contractor to perform services far more essential to the traditional conception of railroad business and absolutely indispensable if the business is to be conducted.

*United States v. Silk*, 331 U.S. 704, 91 L.ed. 1757 held that a common carrier by motor vehicle might employ an

independent trucker to perform its common carrier transportation functions and that the person so employed would not be its employee within the Social Security Act (holding as to Greyvan Lines). The *Bond Case*, p. 63 below, and *Polluck v. Minn. etc. Co.*, 40 S.D. 186, 166 N.W. 641, cert. den. 248 U.S. 558, 63 L.ed. 421 held that handling fuel and necessary supplies for the railroad might be put into the hands of an independent contractor and that in the event of injury in the course of doing the work so delegated the Federal Employers' Liability Act did not apply. Other cases to the same effect are cited in *Reynolds v. Addison Miller Co.*, supra.

Loading and unloading of freight can be handled for a carrier by an independent contractor and the employees of the latter do not become employees of the carrier. The *Drago* and *Bugg Cases* are noticed below at pp. 63, 64. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 L.ed. 1099 held a vessel liable to an employee of a stevedoring company upon a ground not based on employment and, while recognizing that the man was performing ship's service, made it clear that as to responsibility under the Longshoreman's Act, where the basis of liability is employment, the stevedoring company and not the vessel was the employer. Compare *United States v. Boyd-Campbell Co.*, 72 F.2d 40 (C.C.A. 5), *Wilson & Co. v. Locke*, 50 F.2d 81 (C.C.A. 2), *Schotis v. Stevedoring Co.*, 24 F.2d 591 and *Puget Sound etc. Co. v. Tax Com'n*, 203 U.S. 90, 82 L.ed. 68.

So the employees of an independent contractor are not employees of the railroad although the independent contractor is doing construction work on a cost-plus basis (*Campbell v. Jones*, 60 Wash. 265, 110 P. 1083), is procur-

ing rock for ballast from the railroad quarry (*Gogoff v. Ind. Com'n*, 77 Utah, 355, 296 P. 229), or is repairing and maintaining the railroad rolling stock and power (the *Klar Case*, p. 60 below and *Rexroad v. W. Md. Ry. Co.*, 162 Md. 566, 160 Atl. 730).

We pause here to notice the curious situation we should have in the case at bar if this were not the result. At Bakersfield, where plaintiff was working, PFE did icing not only for SP but also for Sunset and for Santa Fe. Is plaintiff a PFE employee or is he a SP employee when he is icing a car for it, a Sunset employee when icing a car for it and a Santa Fe employee when icing a car for the latter? Does his status shift from time to time depending on the work he is doing although he himself has no idea for whom he is icing a car? Is not this just the type of thing the 1939 amendment sought to avoid in the case of railroad employees? And what is his status when, as here, he is not icing a car for any carrier but is unloading ice to be held until such time as it may be needed and when it does not appear whether it was then assigned to go into any particular railroad car and does not appear that in fact it did go into an SP car? If a test is to be applied which would make plaintiff the employee of the common carrier by railroad which directly received the benefit of his service he cannot recover against SP because there is no showing that he was icing a car for SP.

**B. 45 U.S.C.A. §55 Has No Application.**

45 U.S.C.A. §55 provides:

“Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any

liability created by this chapter, shall to that extent be void: \* \* \*."

Appellant cites three cases to support the claim that this section applies. *State v. Bates etc. Co.*, 91 Wash. 181, 157 P. 482 was expressly disapproved in *Reynolds v. Addison Miller Co.*, 143 Wash. 271, 255 P. 110 (see p. 39 above). One case, *Erie R. Co. v. Margue*, 23 F.2d 669, probably correctly decided, goes on the foot of this section and the third, *Moore v. Ind. Com.*, 49 Ohio App. 386, 197 N.E. 403 uses it, probably incorrectly, as an alternative ground of decision.

The *Margue Case* is easy. The Erie Company had been maintaining its own right of way. A company was then organized by its employees formerly engaged in this work. The "company" had no equipment—everything was provided by the railroad—and it was to be paid on the basis of cost of labor and material plus five percent. Either party could terminate on thirty days notice and the railroad could terminate and take possession and control of the work on twenty-four hours notice. The company was a mere sham and the case was put on that ground—on the ground that "one of the purposes of its contract with the construction company was to avoid the liabilities of the Federal Employers' Liability Act." The court expressly distinguishes cases dealing with "the loading and unloading of cars with coal at a terminus, or the performance of a special service, such as express and sleeping-car companies perform, and which the railroad itself is not legally bound to perform." In the *Stevenson Case*, p. 53 above, decided by the same court, the *Margue Case* was distinguished.

In the *Moore Case* the railroad had leased its round-house and shop buildings, etc., to an outside concern which had contracted to maintain rolling equipment, power, etc. Unlike the concern in the *Margue Case* it was a legitimate, independent concern and financially responsible. One of its employees was injured while making emergency repairs on a locomotive. The court felt that it was bound to follow the *Margue Case*, if necessary, but did not really put the case on that ground and rather put it on the ground that the plaintiff, at the time he was injured, although in the general employ of the service company was the special servant of the railroad because the facts showed that at the moment of injury the plaintiff was doing special emergency work under the direct supervision of the railroad road-foreman of engines the court saying,

“But leaving out of consideration the application of the decision in the *Margue Case*, there are facts in the case at bar which constituted plaintiff an employee of the Erie company at the time of his injury, notwithstanding his general employment by railway service company \* \* \*. The plaintiff, being a loaned employee to the railroad company at the time of his injury, was not at the time of his injury an employee of the railway service company within the meaning of the Workmen’s Compensation Act \* \* \*.”

Under the same contract between the Erie and the service company the contrary result was reached in *Klar v. Erie R. Co.*, 118 Ohio St. 612, 162 N.E. 793, cert. den. 279 U.S. 818, 73 L.ed. 975.

But whether the *Margue* and *Moore Cases* were decided correctly or not they can have no application here.

Historically, after the railroad business became established, the railroads undertook to supply tracks, motive power and what became conventional passenger and freight cars. With this equipment the railroads undertook, as carriers, under contract with various shippers or passengers to carry passengers and freight from place to place. In the case of freight the holding out was restricted primarily to carrying fairly bulky, comparatively low value, dead freight which did not need to be accompanied by a messenger or caretaker. This was the general character of the railroad business as such. As communication developed it became apparent that there was room for some special types of service. There were three types of such service which the railroads themselves never undertook to provide and they never became part of the traditional railroad business.

One of these special services was the supplying of sleeping accommodations. By and large, in this country, the providing of this service was by the Pullman Company. This long antedated the enactment of the Federal Employers' Liability Act in 1908. In the circumstances it is not surprising that the Supreme Court held that a contract, part of the necessary arrangements to coordinate the services of the Pullman Company with those of the railroad and to fix the position of Pullman Company employees, should be held valid under Section 5 of the Federal Employers' Liability Act. And this is the holding of the *Robinson Case*, 237 U.S. 84, 91, 59 L.ed. 849, 852.

The development of the express business has the same general history (see *The Express Cases*, 117 U.S. 1, 29 L.ed. 791; *Pfister v. Central Pac. R. Co.*, 70 Cal. 169, 179)—it was a special service not provided by the railroads

and traditionally undertaken by other persons. Again it was held (the *Taylor Case*, 254 U.S. 175, 186, 65 L.ed. 205, 212) that a contractual arrangement limiting the railroad's liability in the case of injury to an employee of the express company was not invalidated by Section 5 of the Federal Employers' Liability Act.

Historically, the situation is exactly the same where special service is provided by way of providing refrigerator cars and protective service. This appears, abundantly, from the facts which are before this Court. The service is one which the railroad could perform but, in the language of the *Fruit Growers Exp. Co. Case*, p. 26 above, there is no reason why this function "with respect to the furnishing of ice might not be performed by an independent contractor." In such circumstances it would be expected that if arrangements were made by a railroad with an independent concern under which the independent concern was to provide the icing service this would not be held to be a device void under Section 5 of the Federal Employers' Liability Act and this is exactly one of the points decided in the *Reynolds Case*, p. 36 above. The court notices the provisions of Section 5, says the first question is whether the plaintiff was an employee of a common carrier by railroad and goes on:

"To answer this question, it is necessary to determine the effect of the contract between the Addison Miller Company and the Northern Pacific Railway Company. Under the authorities, that contract was valid and constituted the Addison Miller Company an independent contractor, and its employees would not be employees of the railway company in interstate commerce; nor would the Addison Miller Com-



pany itself be within the terms of the Federal Employers Liability Act.”

The court cites and discusses the *Robinson Case*, the *Taylor Case*, the *Hull Case* and other cases which will be noticed below, including the *Bond Case*, 240 U.S. 449, 60 L.ed. 735.

Indeed, the cases have gone much farther than it is necessary to go here, and have held that a railroad may employ an independent contractor **to do things which are essential to and an integral part of the traditional railroad business** and that if they do the employees of such third persons are not employees of the railroad.

The holding of *Chicago etc. Co. v. Bond*, 240 U.S. 449, 60 L.ed. 735 can be shortly stated as it was stated in the *Reynolds Case*:

“The contract in that case, between an interstate carrier and an independent employer of labor, involved the shoveling of coal on a per ton basis, the coal being shoveled from cars into chutes for the use of the railroad company’s engines engaged in both intrastate and interstate commerce. It was held that the railroad company, having retained control of what should be done, but not having retained the right to direct how it should be done, was not liable to the employee of the independent contractor; and the court further held that the contract was not an evasion of the federal act and dismissed the action \* \* \*.”

The *Bond Case* itself considers the facts in much more detail and considers in detail the terms of the contract involved.

In *Drago v. Central R. Co.*, 93 N.J.L. 176, 106 A. 803, cert. den. 251 U.S. 553, 64 L.ed. 411 an independent

stevedoring company under contract was performing the traditional railroad work of transferring freight in transit from cars to lighters. The arrangement was held no evasion of Section 5 and it was held that employees of the stevedoring company were not employees of the railroad. This case and the *Bond Case* were followed to the same effect in *Bugg v. Sanders*, 219 Ala. 129, 121 So. 410, where the railroad company employed an outsider to perform the traditional railroad service of transporting freight from bad order cars to good cars so that the transportation could be continued.

There is nothing peculiar in the situation of UP or SP or PFE to make these considerations inapplicable. SP and UP have never undertaken, themselves, to provide special refrigerator cars or protective service. Before PFE began business the service had always been provided by third persons. Before 1907 it was determined to have this business handled and service provided by a Utah corporation, the stock of which would be owned by the two railroads. To this end PFE was organized in 1906 and began business in 1907. This arrangement antedated the Federal Employers' Liability Act of 1908 and obviously was not an attempt to evade the provisions of the statute which had not yet been enacted (cf. *Magruder v. Yellow Cab Co.*, 141 F.2d 324, 325 (C.C.A. 4)). Indeed, in this regard, it is interesting that even if plaintiff had been an employee of the railroad the Federal Employers' Liability Act would not have applied to him, in the work he was doing, before the 1939 amendment. Plaintiff at the time he was injured was not icing a car. He and other employees were working unloading ice to be stored and handled for future use. Before the 1939 amendment a

**railroad** employee doing this work would not have been engaged in interstate commerce and the Federal Employers' Liability Act would not have applied (*Shanks v. Del. L. & W. R. Co.*, 239 U.S. 556, 60 L.ed. 436; *Chicago etc. Co. v. Harrington*, 241 U.S. 157, 60 L.ed. 941; *Ill. etc. Co. v. Collins*, 241 U.S. 641, 60 L.ed. 1216; *Chicago etc. Co. v. Bolle*, 284 U.S. 74, 76 L.ed. 173; *Chicago etc. Co. v. Ind. Com'n*, 284 U.S. 296, 76 L.ed. 304; *N. Y. C. etc. Co. v. Bezue*, 284 U.S. 415, 76 L.ed. 370). And the facts in this case affirmatively show that the method and manner of providing reefer service and railroad protective service as of the time plaintiff was injured had "been used in the United States for many years and for many years long prior to 1939." Finally, PFE was no sham organization such as that in the *Margue Case*. The par value of its issued and outstanding stock was \$24,000,000.00. Its net worth was more than \$40,000,000.00. It owned more than 35,000 reefers. It conducted its own business through its own employees and with its own funds. It was in the car hire business as well as in the protective service business and as a consequence its activities extended all over the United States. In neither line of activity was it confined to contact with SP and UP. Its car hire business it conducted with all railroads. Its protective service business it conducted with many railroads other than SP and UP. It conducted its business in the same way that other car companies conducted their business.

With the situation of such magnitude and of such long standing if there had been any thought on the part of Congress that it was an evasion, or an attempt to evade, §5 or any other section of the Federal Employers' Liability Act, Congress, fully aware of the situation, certainly

would have dealt with it when it amended the Federal Employers' Liability Act in 1939. We need not repeat what is set out above.

It is argued that because **PFE** undertook to indemnify the railroads against liability for injury to its employees Section 5 of the Act is violated. This provision was intended to cover cases where an employee of PFE on PFE premises or as an invitee or licensee on railroad premises was injured by railroad operations and recovered in a common-law action. It is the normal type of provision when activities of two industries are closely associated. It can in no way serve as an argument for invalidity since it in no way affects any remedy of the employee and does not seek to relieve either PFE or the railroads of any liability to him. It is simply a method of adjusting the responsibility for satisfying a judgment between corporations themselves without in any way affecting the rights of third persons. The opinion below fully disposes of this point on this ground (R 84). Secondly, the argument attempts to lift itself by its own boot-straps. It assumes the Federal Employers' Liability Act applies. But it does not. And §5 can not apply where the Act as a whole does not.

### **C. Other Cases Cited.**

Plaintiff has cited two California cases, *Southern Pacific Co. v. McColgan*, 68 C.A.2d 48, 156 P.2d 81, and *National Ice Company v. Pacific Fruit Express*, 11 C.2d 283, 79 P.2d 380. Both cases are tax cases and involve the construction and constitutionality of tax statutes. They do not have even remote bearing.

The question in the *Southern Pacific Case* was whether the California corporation and franchise tax reached dividends. This involved a number of questions, one of which was where the securities technically were held. One of the companies whose stock was held was PFE. It is interesting to notice that one of the facts relied on by the Court was that Southern Pacific Company "engaged in no activity with respect to the stocks here involved except the receipt and disbursement of dividends."

The *National Ice Case* is simpler. National Ice Company sold ice to PFE. The question was whether it could collect the California retail sales tax from PFE. It was held that it could not, that the tax was one imposed upon the seller and that, in the circumstances of this case, a provision of the statute attempting to shift the seller's tax on to the shoulders of the buyer was unconstitutional. The Court, by way of dictum, talked about whether the sale was a retail sale to which the tax would apply. The ice was for use in refrigerator cars. Obviously it was a retail sale. PFE was not going to use the ice for resale. It did not provide the ice to the railroad by selling it to them. There was no resale.

Appellant also cites *Cimorelli v. N. Y. C. R. Co.*, 148 F.2d 575 (C.C.A. 6) followed in *Penn. R. Co. v. Roth*, 163 F.2d 161 (C.C.A. 6). The *Roth Case* adds nothing to the *Cimorelli Case*. Both were cases in which the railroad, under contract with the government, undertook to operate a train and storage yard for the purpose of handling war materials in transit. In each case the railroad had a third person supply labor and equipment to do a part of the work but under the supervision, and at the direction, of the railroad. Each case held, on its peculiar facts, that a

laborer so supplied was an employee of the railroad under the Federal Employers' Liability Act. Compare, holding the other way, when the railroad did not retain control of the details the *Bond Case*, p. 63 above, the *Drago Case*, p. 63 above, and the *Bugg Case*, p. 64 above. The agreement in the *Cimorelli Case* had a provision that the supplier of labor and equipment should perform the work as an independent contractor but the Court held, as we argued above at p. 49, that such characterization did not control—that “neither the form of expression on the one hand, nor the name on the other, is conclusive.”

“The spirit and purpose of an agreement, as well as its letter, must be considered in the interpretation and application of a contract. What a contract is styled by the parties does not determine its character or their legal relation.”

Accordingly, the Court reviewed the facts and found that the agreement with the Duffy Construction Company was only for unloading and loading the cars and that this was “the only part of the work delegated”; that the railroad had not “given up its proprietorship of the particular business to the Duffy Construction Company”; that the railroad superintendent determined the amount of work to be done, fixed the time and place of work and determined how much equipment had to be furnished and the number of persons to be employed; that the work was to be done in the railroad yard and no part of the premises was surrendered to Duffy; that the whole project involved interdependent details and the control of one could not be surrendered without disorganization of the whole; that the railroad superintendent had to approve in advance every

item of cost and the necessity of the purchase of equipment and the wages to be paid. The Court summarized the situation by saying that it was manifest "that through appellee's superintendent, full control over the means and manner of performance of the contract was reserved to appellee and that there was left in the contractor no independence." In the *Roth Case* the Court said that the situation "is substantially the same as it was in the *Cimorelli Case*." Neither case has remote resemblance to the case at bar.

### CONCLUSION

It is respectfully submitted that the trial court arrived at the only possible conclusion. This is so whether the case be considered in detail or in its broader aspects. The broader aspects are compelling. The business of PFE is one of the great industries of the country. The nature of this business and its relation to railroading were well-known to Congress. Congress adopted legislation regulating and affecting it in some aspects. Congress deliberately elected not to extend the Federal Employers' Liability Act to car companies and their employees. Rather, their employment being local, and not subject to the peculiar hazards of railroading—it involves office workers, shop workers, ice plant workers and loading dock workers but no railroad men—it elected not to differentiate these men from men doing substantially similar work in the same community but has left them to their remedy under the State Compensation Acts.

Dated at San Francisco, California, January 18, 1949.

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No. 12,062

IN THE  
United States Court of Appeals  
For the Ninth Circuit

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ROBERT H. GAULDEN,

*Appellant,*

vs.

SOUTHERN PACIFIC COMPANY and

PACIFIC FRUIT EXPRESS COMPANY,

*Appellees.*

APPELLANT'S REPLY BRIEF.

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FILED

JAN 21 1949

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**APPELLANT'S REPLY BRIEF.**

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**THE ISSUES.**

Appellant in this reply brief deems it necessary to reiterate the main issues in this appeal. Appellees in their brief would have this Court believe that the only issue herein is whether an employee of a refrigerator car company is *per se* an employee of a common carrier by railroad under the Federal Employers' Liability Act. (45 U.S.C.A. 51.)

For the sake of clarity appellant again asserts the issues as follows:

Appellant contends that the appellee, Pacific Fruit Express Company, at the time of his accident, was the agent of the appellee, Southern Pacific Company,

and not an independent contractor, by virtue of the written agency agreement (R54) between the appellees, and particularly in view of the right of control therein given appellee, Southern Pacific Company, a common carrier by railroad, in the manner in which the work was to be done under said contract, and furthermore by virtue of the Southern Pacific Company's right to supply labor and materials in fulfillment of the contract provisions.

Appellant also asserts that the Federal Employers' Liability Act being remedial and humanitarian in nature, the Courts after the liberalizing 1939 amendment should construe liberally the phrase "common carrier by railroad". Points 2 and 3 of appellant's original brief are also issues asserted and again referred to. (See Appellant's Brief, p. 8.)

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#### **CORRECTING APPELLEES' STATEMENT OF FACTS.**

Appellees would have this Court believe that appellant was not engaged in any work to provide service for the appellee, Southern Pacific Company, because the Pacific Fruit Express Company handled ice for other railroads at Bakersfield, yet they are bound by their admissions in their answers to appellant's interrogatories in which it is admitted that the icing service rendered by Pacific Fruit Express Company under its Protective Service Contract of July 1, 1942 between it and Southern Pacific Company and Union Pacific Company applied only to Southern Pacific Company in regard to the service under said Contract

by Pacific Fruit Express Company at Bakersfield on June 7, 1946 at the time of the accident to plaintiff. (R51)

Appellees further admitted that all switching in and out of the unloading and icing tracks at Bakersfield was done by Southern Pacific Company's switch engines and crews and in this sense all iced reefers leaving the Pacific Fruit Express Company's plant at Bakersfield made their initial movement by engines under the control and management of Southern Pacific Company. The mere fact that Pacific Fruit Express Company serviced other railroads at Bakersfield is immaterial.

In its preliminary statement appellees in its brief misquote the facts by stating that Gaulden was injured while unloading ice from a railroad car. The stipulation and order filed herein (R19), signed by both counsel for appellant and appellees, state that appellant's duties were the "icing and moving of cars". Both the complaint (R2) on file herein and the answer (R7) show that after appellant had unloaded ice from a refrigerator car he was injured while in the act of a railroad movement, to wit, the moving of a certain empty car when a loaded ice car to the rear was being pulled up to the unloading platform by a cable and winch, and that at said time and place, and while plaintiff was pushing said empty car, pursuant to the order of a foreman, a wheel of the loaded ice car ran over his leg, which was smashed and later amputated.

Appellees in their brief assert that the Contract between them does not mean what it clearly says and that the Contract provisions making Pacific Fruit Express Company the agent of Southern Pacific Company does not mean an agency. Appellant contends the terms of the Contract are self explanatory.

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### **DISTINGUISHING APPELLEES' CASES.**

Appellees claim that the case of *Reynolds v. Addison Miller Co.*, 143 Wash. 271, 255 Pac. 110, is on all fours with the issue herein. Appellant contends that this case is clearly distinguishable from the issue herein, in that the facts of the *Reynolds* case clearly show that the Northern Pacific Railway Company's arrangement with the Addison Miller Co. for icing its cars was one wherein the Addison Miller Co. was an independent contractor. The Addison Miller Co. had no agency contract with the Northern Pacific Railway Company. In the *Reynolds* case the Addison Miller Co. was the lessee of an ice platform from the Northern Pacific Railway Company and agreed by contract to supply ice to the railroad for ten years at a fixed price per ton. Reynolds, an employee of the Addison Miller Co., was injured while loading ice. The contract between the railroad and the icing company had no agency feature such as in the contract involved here, and the railroad only had the right to inspect the work done to see if the contract was complied with. The case is clearly distinguished from the issue here where the appellee, Southern Pacific Company,



under its agency contract had an absolute right of control, and in the Southern Pacific Company's contract with the Pacific Fruit Express Company, the appellee, Southern Pacific Company, is given the right to furnish its own employees and equipment. Furthermore, in the instant case, the appellee, Pacific Fruit Express Company, is owned fifty per cent by the appellee, Southern Pacific Company.

In order to further distinguish the present case from the case of *Reynolds v. Addison Miller Co.* we quote the facts as stated by the Court in that decision:

"The railway company had the right to inspect the work performed by the Addison Miller Company, for the purpose of ascertaining whether it was complying with the agreement. The Addison Miller Company was to furnish all the men, supplies, and material for this work, select all its help and fix their wages, and had the exclusive power of directing them as to their duties and the time and place where they should perform them; *the railway company having no authority in any manner over such employees.*"

Contrast this with the provisions of the Southern Pacific Company's-Pacific Fruit Company's Agency Contract, particularly paragraph 8 of the Contract, which reads as follows:

"The services called for by this contract shall be performed by the Car Line without unjust discrimination against or undue favor to the Southern System, the Union System, or any shipper. *In the performance of such service, the order of the System on whose tracks loading, un-*

*loading, or movement takes place shall be promptly and strictly obeyed by the Car Line."*

("Car Line" has been defined by the contract to mean the Pacific Fruit Express Company.)

Paragraph 10 of the agency contract provides that the appellee, Southern Pacific Company, agrees to have its employees act as agents for the Car Line in its icing service.

The Court in the *Reynolds* case further stated:

"The question, then, first for consideration under this act, is whether at the time of the respondent's injury he was an employee of a common carrier by railroad. To answer this question, it is necessary to determine the effect of the contract between the Addison Miller Company and the Northern Pacific Railway Company. Under the authorities, that contract was valid and constituted the Addison Miller Company an independent contractor, and its employees would not be employees of the railway company engaged in interstate commerce; nor would the Addison Miller Company itself be within the terms of the Federal Employers' Liability Act."

Appellant contends that it is quite obvious from the facts in the *Reynolds* case that the Addison Miller Company was an independent contractor. Appellant asserts that the Pacific Fruit Express Company was acting as the agent of the Southern Pacific Company, while appellees contend the Pacific Fruit Express Company in the instant case is acting as an independent contractor. As mentioned in our opening

brief, where one has a right of control over the actions of another, said latter party becomes the agent of the first party and not an independent contractor.

Appellees cite several cases to support their viewpoint. These cases are mostly cases involving the question whether the Pullman Companies and Express Companies are common carriers by railroad under the Federal Employers' Liability Act and involve cases where either the contractual arrangements were different than in the instant case or where the factual situation was different. It is important to note that none of the cases cited by the appellees as supporting their contention are cases involving an agency contract or a contract with a *right of control* such as in the case at bar.

The Supreme Court of the United States in the case of *Standard Oil Company v. Anderson*, 212 U.S. 215, 53 L. Ed. 480, holds that one in the service of another may be so transferred to the service of a third party as to become the latter's servant with all the consequences of the new relationship. The Court specifically stated

"The master is the person in whose business he (the workman) is engaged at the time, and who has the right to control and direct his conduct."

Thus, it would seem that the Supreme Court has definitely laid down the rule that direction and right of control of work usually are determinative of the relationship of master and servant.

Appellant respectfully points out that paragraph 1 of the agency agreement between the Southern Pacific Company and the Pacific Fruit Express Company provides that

“The Pacific Fruit Express Company shall undertake and perform, *as the agent of the Railroads*, all of the services necessary to the effective refrigeration\* \* \*”. (R57)

Paragraph 2 of the Agreement provides that

“The Car Line agrees, *as agent for the Railroads*, to furnish ice necessary for the protection of all perishable freight handled by the Railroads \* \* \*”. (R57)

It is further significant to note that paragraph 8 of the Agreement provides that the orders of the railroad system on whose tracks loading or unloading takes place shall be promptly and strictly obeyed by the Pacific Fruit Express Company *in the services called for by this contract*. Hence, the Southern Pacific Company has a right to control the entire work done by the Pacific Fruit Express Company. Paragraph 8 of the Contract does not merely give the railroad the right to issue orders respecting railroad movement, but the right to control all services called for by the contract. This is the distinguishing feature between the agency contract here involved and the *Express* and *Pullman* cases. In the *Express* and *Pullman* cases the railroads had no right of control over the Express and Pullman Company activities other than actual railroad movements. This distinction, we

respectfully submit, is the crux of the entire issue herein.

Appellant's position reduced to a general statement is that the Southern Pacific Company by virtue of its agency contract had a right to control the entire icing procedure performed by the Pacific Fruit Express Company, and that, therefore, under the doctrine of *respondeat superior* appellant became the servant of the Southern Pacific Company, his master's master, and he is entitled to have his case submitted to a jury under the Federal Employers' Liability Act.

Appellees in their brief seem to rely on nine principal cases, each of which we shall hereafter discuss and distinguish. Appellees cite the case of *Ellis v. I.C.C.*, 237 U.S. 434, 59 L. Ed. 1036, decided in 1915. The question there involved was whether an officer of the Armour Express Lines could be forced to answer questions of the Interstate Commerce Commission. In that case there was no agency contract involved with the railroad company. The Court found that the Armour Lines was an independent contractor and stated

“But still until Armour Car Lines is shown to be merely the tool of Armour & Company it has the general immunities we have stated.”

Appellees also cite *Wells Fargo v. Taylor*, 254 U.S. 175, 65 L. Ed. 205, wherein an employee of the Wells Fargo Express was injured. The express company had a contract with the railroad company which by its terms specifically made the express company an inde-

pendent contractor. There was no agency agreement or ownership as in the instant case, nor was there any partnership between the Wells Fargo and the railroad company. The express company agreed to assume all risk and damage to its agents and employees.

In the case of *Robinson v. Baltimore & O. R. Co.*, 237 U.S. 84, 59 L. Ed. 849, decided in 1915, also cited by appellees, the case involved the status of an employee of the Pullman Company, a porter, while riding on a Pullman car attached to a Baltimore & Ohio Railroad Company train. The railroad had a contract with the Pullman Company specifically making the Pullman Company an independent contractor, and the Pullman Company and its employees waived any claims for liability against the railroad. The Court stated

“The contract between the Pullman Company and the railroad company was introduced in evidence. Without attempting to state its details, it is sufficient to say that the case was not one of co-proprietorship (see *Oliver v. Northern P. R. Co.*, 196 Fed. 432, 435) \* \* \* We think it to be clear that in employing its servants the Pullman Company did not act as the agent of the railroad company. The service provided by the Pullman Company was, it is true, subject to the exigencies of railroad transportation, and the railroad company had the control essential to the performance of its functions as a common carrier. To this end the employees of the Pullman Company were bound by the rules and regulations of the railroad company. This authority of the

latter was commensurate with its duty, and existed only that it might perform its paramount obligation. With this limitation, the Pullman Company supplied its own facilities \* \* \*"

It is quite apparent that the distinguishing feature in the *Robinson* case and the case at bar is that in the *Robinson* case the railroad had no control over the handling of Pullman business other than the exigencies of the actual railroad movement. Referring once again to the agency contract involved herein, the Southern Pacific Company not only had control of the railroad movement, but according to paragraph 8 of the agency contract, complete control over the entire icing service being handled by the Pacific Fruit Express Company.

Appellees also cite *U. S. v. I.C.C.*, 265 U.S. 292, 68 L. Ed. 1024 (1924), wherein the Court held that a car company whose business consists in leasing its refrigerator cars to railroads, but which company does not use such facilities necessary for carriage, is not *per se* a "common carrier by railroad" within the meaning of the Transportation Act of 1920. This case is totally irrelevant, as there was no question here of interpretation of an agency contract such as in the case at bar.

*U. S. v. Fruit Growers Assn.*, 279 U.S. 363, 73 L. Ed. 739, involves an Interstate Commerce Commission hearing wherein a corporation performing the service of icing refrigerator cars under a contract with a railroad company made false reports to the Commission. The Court held the refrigerator company was an inde-

pendent contractor. Here again there was no agency contract involved.

Appellees also cite *General American Tank Car Co. v. El Dorado*, 308 U.S. 422, 84 L. Ed. 361, which merely holds that a corporation owning and leasing tank cars to a railroad does not become a railroad carrier under the Interstate Commerce Commission Act.

Appellees cite *U. S. v. American Ry.*, 265 U.S. 425, 68 L. Ed. 1087, which holds the same as the former case; both, however, are irrelevant here, as there was no agency contract involved.

Appellees also cite and seem to rely on the case of *Chicago Rock Island v. Bond*, 240 U.S. 449, 60 L. Ed. 735, decided in 1916. The case involved a contract made to furnish coal needed by a railroad. The contractor was made responsible for the faithful performance of the contract and was to provide all labor, and the contract contained an explicit provision that the carrier "reserves and holds no control over him in the doing of such work other than as to the results to be accomplished." Such provision obviously made the contractor an independent contractor and the Court rightfully so held. This case can also be distinguished, in that there was no agency contract or joint control as in the case at bar.

Appellees also cite as authority in their support the case of *Drago v. Central Railroad Co. of New Jersey*, 106 Atl. 803. In that case an interstate railroad company contracted with an independent steve-



doring company, whereby for a stipulated price per ton, the stevedoring company undertook to load and unload freight of the railroad company. The stevedoring company was to select and remove its own servants, define their duties, fix and pay their wages and supervise the performance of their tasks subject only to inspection by the railroad company. Here again the Court rightly decided that the stevedoring company was an independent contractor, as there was no element of actual control by the railroad company.

The Court in analyzing appellees cases will, we feel sure, readily see the distinction between all of them and the instant case. All of the cases relied upon by appellees, were obviously from the facts, cases where an independent contractor performed services for railroad companies. In none of the cases cited by appellees was a railroad company given any right of control over the terms of the contract other than the right to inspect or to make orders required by the exigencies of railroad transportation. The clear language of paragraph 8 of the agency contract herein expressly and explicitly states that *in the performance of the services called for by this contract the orders of the railroad system on whose tracks loading, unloading, or movement takes place shall be promptly and strictly obeyed by the Pacific Fruit Express Company*. Paragraph 10 provides that the railroads agree to have their employees act as agents for the Pacific Fruit Express Company in the service involved herein.

## THE CIMORELLI CASE.

Appellant relies on the cases cited in his opening brief in support of his contention that *a right of control*, such as given appellee, Southern Pacific Company, by appellee, Pacific Fruit Express Company, in the Contract between them is sufficient to make appellant the employee of appellee, Southern Pacific Company, his master's master.

Rather than be repetitious appellant merely refers to the case of *Cimorelli v. New York Central R. R. Co.*, 148 Fed. (2d) 575, which is particularly in point on the issue of *right of control*.

In that case the New York Central R. R. Co. made a contract with the government whereby the railroad company agreed to maintain a storage place for war material in transit and further provided for unloading and reloading cars.

The railroad company contracted with the Duffy Construction Company for the unloading and reloading of the cars. The construction company was required to furnish its own equipment and labor. There was a special provision in the contract that the Duffy Company was to perform as an independent contractor.

Plaintiff, an employee of the Construction Company, was injured while unloading freight. The Court found that under the subcontract that only part of the work delegated to the Duffy Company was to un-

load and load the freight. The railroad superintendent selected the places where the work was to be done, what equipment was to be furnished and the number of persons to be employed in the work and the Court, as a result decided that the railroad company thus controlled the work.

The Court said at page 577 of the decision:

“and so the first question here is whether appellee, for whom the work was being done, had given up its proprietorship of the particular business to the Duffy Construction Co. and had thus divested itself of *the right of control*, to the extent that it had no longer a legal right to terminate the work or to direct it. If appellee had done nothing to limit its rights with regard to the business which was being done for its benefit, but had retained its proprietorship of it, each person working for the Duffy Construction Company was legally subject to appellee’s control while so engaged and was the employee of appellee. *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 10 S. Ct. 175, 33 L. Ed. 440; *The Standard Oil Co. v. Anderson*, 212 U.S. 215, 29 S. Ct. 252, 53 L. Ed. 480.”

The Court further said: “One of the tests is who has the *right of control* over the work being done”.

The *Cimorelli* case has been followed by the recent case of *Pennsylvania R. Co. v. Roth*, 163 Fed. (2d) 161. Both of the above cases relied on by appellant hold that an actual exercise of control or a *right of control* over another makes such person the agent of

the person either exercising or having a right of control.

Dated, San Francisco,  
January 28, 1949.

Respectfully submitted,

DANIEL V. RYAN,

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RYAN & RYAN,

*Attorneys for Appellant.*

No. 12,063

IN THE

United States Court of Appeals

For the Ninth Circuit

---

JOSEPH P. LYNCH,

vs.

*Appellant,*

E. B. SWOPE, Warden, United States  
Penitentiary, Alcatraz, California,

*Appellee.*

BRIEF FOR APPELLEE.

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*Attorneys for Appellee.*



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No. 12,063

IN THE

**United States Court of Appeals  
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---

JOSEPH P. LYNCH,

*Appellant,*

VS.

E. B. SWOPE, Warden United States  
Penitentiary, Alcatraz, California,

*Appellee.*

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**BRIEF FOR APPELLEE.**

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**JURISDICTIONAL STATEMENT.**

This is an appeal from an order of the United States District Court for the Northern District of California denying appellant's petition for writ of habeas corpus (Tr. 33-35). At the time the action was brought the District Court had jurisdiction over the habeas corpus proceedings under Title 28 U.S.C.A., Sections 451, 452 and 453, now superseded by Title 28 U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the District Court denying the petition is now conferred upon this Court by Title 28 U.S.C.A., Section 2253, but at the time the notice of appeal was filed herein, such jurisdiction was conferred by Title 28 U.S.C.A., Sections 463 and 225.

**STATEMENT OF THE CASE.**

The appellant, an inmate of the United States penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus (Tr. pp. 1-22) and the Court below issued an order to show cause (Tr. p. 23). Thereafter the appellee filed a return to order to show cause and a memorandum of points and authorities in support thereof, contending that the petition should be denied on the basis of a prior denial of a habeas corpus application heretofore filed by the appellant (Tr. 24-27). The appellant then filed a traverse to return on order to show cause (Tr. 28-32). Thereafter the matter was submitted and the Court below filed the following written order denying petition for writ of habeas corpus and discharging the order to show cause:

“Petitioner was indicted in the United States District Court for the Middle District of Pennsylvania for the crime of murder in the first degree. He entered a plea of guilty to the crime of murder in the second degree and is at present serving the twenty year sentence imposed therefor. In this his second application for writ of habeas corpus he alleges that he was denied the effective assistance of counsel because the trial court failed to grant his counsel’s motion for leave to withdraw the plea of guilty and enter a not guilty plea. The case is submitted to this court on the petition for writ of habeas corpus, the order show cause, return to the order to show cause, and traverse to the return, together with a memorandum of points and authorities filed by each of the parties herein.

“Petitioner’s first application likewise alleged denial of the effective assistance of counsel but on the ground that he was coerced into making a confession and entering a guilty plea. Judge George B. Harris of this court gave petitioner a full hearing on the issues raised and in his order of October 17, 1947, denying the petition, Judge Harris specifically found that petitioner ‘was duly represented by counsel appointed by the trial court during all stages of the proceedings; was duly arraigned before said court, knew the nature of the charge against him and competently, intelligently, freely and voluntarily entered a plea of guilty to the charge contained in the indictment.’ This order was subsequently affirmed by the Circuit Court of Appeals for the Ninth Circuit in an opinion filed on May 7, 1948.

“The instant petition raises no new issue of fact. Permission to substitute a plea of not guilty for one of guilty lies within the court’s discretion. *Kercheval v. United States*, 274 U.S. 220, 224. There is nothing in the record to indicate that the court abused its discretion. In view of the foregoing, therefore, the court finds that no new issue of fact is raised in this second petition and the principle enunciated by the Supreme Court in *Price v. Johnston*, No. 111, October Term 1947, decided May 24, 1948 (citing *Salinger v. Loisel*, 265 U.S. 224), therefore becomes applicable: ‘While habeas corpus proceedings are free from the res judicata principle, a prior refusal to discharge the prisoner is not without bearing or weight when a later habeas corpus application raising the same issues is considered.’

“IT IS THEREFORE ORDERED that the petition for writ of habeas corpus herein be, and the same is, hereby DENIED, and the order to show cause heretofore issued be, and the same is, hereby DISCHARGED.

Dated: August 6, 1948.

s/ Michael J. Roche,

United States District Judge.”

(Tr. pp. 33-35.)

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### QUESTION.

Was the Court below under an obligation to produce the body of appellant before it to determine if he was entitled to his discharge?

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### CONTENTION OF APPELLEE.

The answer to the above stated question is “No”.

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### ARGUMENT.

It must be conceded that if petitioner failed to allege any new matter cognizable in habeas corpus in the instant petition, that the Court in its discretion properly refused to issue a writ and hold a hearing thereon on the basis of the prior denial of his petition<sup>1</sup>

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<sup>1</sup>*Price v. Johnston*, S. Ct, 111, October term 1947, decided May 24, 1948, 334 U.S. 266, 289, citing, *Salinger v. Loisel*, 265 U.S. 224;

*Wong Doo v. United States*, 265 U.S. 239;

by United States District Judge George B. Harris in case Number 26251-H, which denial was affirmed by this Honorable Court.

*Lynch v. Johnston*, 167 F. (2d) 1000.

What petitioner is saying is that he is raising new matter, which, if proven, would entitle him to a discharge from the custody of the appellee. He argues that a contention that the trial Court refused to substitute a plea of "not guilty" for one of "guilty" is such new matter. The Court below correctly decided otherwise, stating that the substitution of a plea of "not guilty" for one of "guilty" is clearly within the trial Court's discretion, citing *Kercheval v. United States*, 274 U.S. 220, 224, a case on which the appellee herein also relies. As a matter of fact the affidavit of his counsel who represented him before the trial Court, in which the matter of substitution of pleas was gone into at great length, was made a part of the record in the proceedings in case Number 26251-H, hereinabove referred to and also set out by appellant herein in his opening brief. In these proceedings before Judge Harris it is obvious that he considered this point, even though he was under no obligation to do so in a habeas corpus proceeding. This may be seen by reference to his order denying petitioner's

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*Swihart v. Johnston* (CCA-9), 150 F. (2d) 721, certiorari denied, 327 U.S. 789;

*Garrison v. Johnston* (CCA-9), 151 F. (2d) 1011, certiorari denied, 328 U.S. 840;

*Wilson v. Johnston* (CCA-9), 154 F. (2d) 111, certiorari denied, 328 U.S. 872;

*McMahan v. Johnston* (CCA-9), 157 F. (2d) 915, certiorari denied, 331 U.S. 814.

application for writ of habeas corpus, mention of which was made by the Court below in its order entered herein. Judge Harris' finding was that petitioner "competently, intelligently, freely and voluntarily entered a plea of guilty to the charge contained in the indictment."

Appellant also argues that a contention made in the instant application, that he was denied a trial before a jury, constitutes new matter which would entitle him to another hearing. Judge Harris' finding as above indicated, that appellant "competently, intelligently, freely and voluntarily entered a plea of guilty to the charge contained in the indictment" completely disposed of this contention, as did Judge Harris' finding that petitioner "was afforded a fair and complete trial" and that he was "duly represented by counsel appointed by the trial Court during all stages of the proceedings; was duly arraigned before said Court; knew the nature of the charge against him \* \* \*" (Tr. 25).

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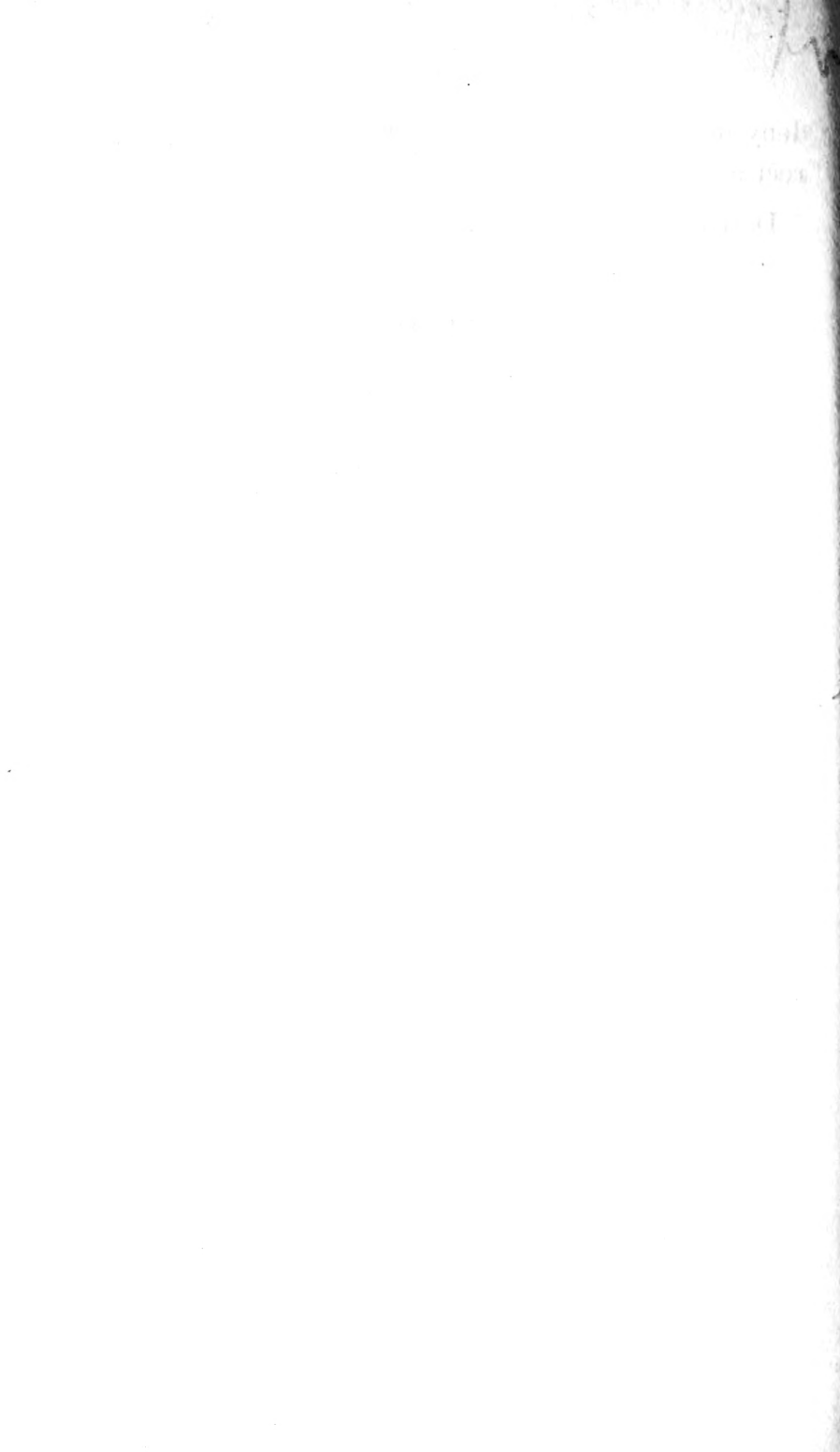
### CONCLUSION.

The instant petition alleges no new material facts which, if true, would require the granting of a writ of habeas corpus and the discharge of appellant. The Court below was therefore under no obligation to produce the body of appellant before it to determine if he was entitled to his discharge. Accordingly it is respectfully urged that the order of the Court below

denying petition for writ of habeas corpus was correct and should be affirmed.

Dated, San Francisco, California,  
November 19, 1948.

FRANK J. HENNESSY,  
United States Attorney,  
JOSEPH KARESH,  
Assistant United States Attorney,  
*Attorneys for Appellee.*





~~ORIGINAL~~  
No. 12066

~~Docketed~~

United States  
Court of Appeals  
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

DIAMOND FOTOPULOS and THOMAS FOTO-  
PULOS and JOAN FOTOPULOS, minors, by  
and through their guardian ad litem, Diamond  
Fotopulos,

Appellees.

Transcript of Record

Appeal from the United States District Court  
for the Northern District of California,  
Southern Division

FILED

JAN 24 1949

PAUL P. O'BRIEN,  
CLERK



No. 12066

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United States  
Court of Appeals  
for the Ninth Circuit

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UNITED STATES OF AMERICA,  
Appellant,  
vs.

DIAMOND FOTOPULOS and THOMAS FOTO-  
PULOS and JOAN FOTOPULOS, minors, by  
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Transcript of Record

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Appeal from the United States District Court  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the  
Northern District of California, Southern Division

No. 26833-H

DIAMOND FOTOPULOS and THOMAS FOTOPULOS, and JOAN FOTOPULOS, Minors,  
by and Through Their Guardian ad litem, DIAMOND FOTOPULOS,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR DAMAGES UNDER  
FEDERAL TORT CLAIMS ACT

Plaintiffs complain of the defendant above named  
and for cause of action allege:

I.

That at all times herein mentioned a certain Charles A. Bailey was an employee of a federal agency of the United States of America, defendant herein, to-wit: a soldier for the Army of the United States, and was acting in the course and scope of said employment.

II.

That the City and County of San Francisco, State of California, where an accident, hereinafter alleged, occurred, is located in and is a part of the Northern District of California, Southern Division, and by reason thereof is within the juris-

diction of the above-entitled United States District Court.

### III.

That plaintiff Diamond Fotopulos is the widow of Peter Fotopulos, deceased, and that she and the said deceased intermarried on the 24th day [1\*] of November, 1935, and ever since were husband and wife to the date of the death of the said Peter Fotopulos on the 10th day of January, 1947; that Thomas Fotopulos, aged ten (10) years and Joan Fotopulos, aged nine (9) years, are the children of Diamond Fotopulos and Peter Fotopulos, deceased; that before the complaint herein was filed Diamond Fotopulos was appointed Guardian ad litem of Thomas Fotopulos and Joan Fotopulos, minors, for the purpose of representing and acting for them as plaintiffs in the prosecution of this action; that all of the plaintiffs were and are residents of San Mateo County, State of California, which county is within the Northern District of California, Southern Division, and within the jurisdiction of the above-named United States District Court.

### IV.

That Van Ness Avenue and Bush Street are public streets and thoroughfares in the City and County of San Francisco, State of California.

### V.

That on the 23rd day of December, 1946, at the hour of 9:30 a.m. of said day, the said Peter Foto-

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

pulos was driving his Dodge automobile light truck in a northerly direction on Van Ness Avenue near Bush Street and at the same time and place the defendant, The United States of America, by and through Charles A. Bailey, an employee of one of its federal agencies, to-wit: the Army of the United States, acting in the course and scope of his employment, did so carelessly, negligently and recklessly drive and operate a certain truck owned by the Post Motor Pool, United States Army, an agency of the defendant above named, in a northerly direction, so as to cause the said Army truck to collide with the light automobile truck of Peter Fotopulos, deceased; that as a proximate result of said negligence, carelessness and recklessness of said Charles A. Bailey, the said Peter Fotopulos, deceased, was caused to sustain personal injuries which said injuries caused his death on the 10th day of January, 1947.

## VI.

That by reason of the death of the said Peter Fotopulos, the plaintiff, Diamond Fotopulos has suffered, through said death, the loss of her husband and his society, comfort, support and services to her; [2] that the said plaintiffs Thomas Fotopulos and Joan Fotopulos, minors, the children of the said Peter Fotopulos, deceased, were thereby deprived of the care, nurture, training, society, support and education of their father.

## VII.

That by reason of the said negligence, carelessness and recklessness of the said defendant, The

United States of America, by and through one of its agencies' employees and as a proximate result thereof, plaintiffs have been damaged in the aggregate sum of One hundred thousand (\$100,000.00) Dollars.

Wherefore plaintiffs pray judgment against the defendant as follows:

1. For the sum of One hundred thousand (\$100,000.00) Dollars together with their costs herein expended.

2. For such other and further relief as to the Court may appear meet and proper.

CARROLL S. BUCHER,  
Attorney for Plaintiff.

State of California,  
City and County of San Francisco—ss.

Diamond Fotopulos, being duly sworn on her oath deposes and says: that she is one of the plaintiffs in the above-entitled action; that she has read the foregoing Complaint and knows the contents thereof that the same is true of her own knowledge, except as to the matters therein alleged on information or belief, and as to such matters she believes it to be true.

/s/ DIAMOND FOTOPULOS.

Subscribed and sworn to before me this 28th day of January, 1947.

ALFRED D. MARTIN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Jan. 29, 1947. [3]

[Title of District Court and Cause.]

### ANSWER

Now comes the defendant and answering the complaint herein denies and alleges as follows:

#### I.

Denies all the allegations of paragraphs I, III, VI and VII.

#### II.

Answering paragraph V, denies all the allegations thereof except that it is admitted that on the 23rd day of December, 1946, at or about the hour of 9:00 a.m. said Peter Fotopulos was driving his Dodge light truck automobile in a northerly direction on Van Ness Avenue near Bush Street. [4]

For a further and separate defense, defendant alleges:

#### I.

That said Peter Fotopulos was careless and negligent in and about the matter set forth in said complaint and carelessly drove and operated his automobile and that said carelessness and negligence of Peter Fotopulos was the proximate cause of the alleged damages and proximately contributed thereto.

Wherefore defendant prays that the action be dismissed and that it have its costs incurred herein.

/s/ FRANK J. HENNESSY,

United States Attorney,

Attorney for Defendant.

By R. B. McMILLAN,

Assistant U. S. Attorney.

[Endorsed]: Filed Sept. 19, 1947. [5]

(Copy)

Excerpt from Federal Bureau of Investigation

REPORT OF MATTHEW J. LIGHTBODY

San Francisco, 11-17-47.

Diamond Fotopulos, et al.

No. 26833

\* \* \*

10/28/47.

“Dr. John J. Kingston, Coroner, 650 Marchant Street.

“Autopsy 1/10/47 by Dr. Milton Rosenthal, 858½ Clayton, S. F.

“Case No. 91—Necropsy Department.

The subject is a well developed, somewhat obese, adult white male appearing about 49 years of age. There is slight rigor mortis and well developed hypostasis. There is a 20 cm. verticle, right abdominal surgical wound, held together by clips, and lateral to this wound is a wound of an ileostomy. There is no subcutaneous ecchymosis.

Incision: Made into a peritoneal cavity which contains about 500 cc. of yellow green pus which is distributed in the right colonic gutter and over the dome of the right lobe of the liver. There is a corresponding acute inflammatory change with discoloration, fiber deposition on the fat and ascending colon and dome of the liver in this region, but the peritonitis does not extend elsewhere. There is no walling off of a sub-splenic abscess. Dissection of the region and of the vessels show the following: About the first 30 cm. of the ascending

colon show a colonic wall which is thin, necrotic, and hemorrhagic. About 12 cm. above the cecum a three cm. perforation has been sutured; it appears not to have disrupted. Off the cecum itself there is another suture perforation, about 1 cm. in size, it is also intact. There is the stump of an appendix recently removed with a purse-string suture. The region of the cecum is also involved in the peritonitis. About 20 cm. from the ilio-cecal valve the ileum has been introduced into the ileostomy stab wound and the ileostomy appears to be functional without perforation. The considerable amount of ileocecal fat and retoperitoneal fat in the region shows a great deal of—with induration, petechial hemorrhages, and other evidences of subacute inflammation. [6] No neoplastic tissue is found in the vessels about this region and they contain no thrombi. The pelvic veins, inferior vena cava, as well as the corresponding arteries are dissected out and the inferior mesenteric vein and artery, particularly, contain no thrombi, nor do the other vessels in this region.

Liver: The liver is of normal size and configuration. The peritonitis on this surface has been described. The organ itself has normal color and architecture except for ill defined areas of yellow discoloration of the toxic type. The biliary tract is not remarkable. The pancreas shows no hemorrhage or necrosis, although there is some post mortem autolysis. The Spleen is not enlarged. The stomach contains a small amount of chyme without unusual odor. The result of the gastro-intestinal



tract shows moderate dilatation, particularly of the small intestine. This is not an advanced ileus.

**Kidneys:** The kidneys are of normal size and contour. The left kidneys contain two rather large atherosclerotic cysts with thin smooth walls and one contains some brown purpuric, necrotic material. There is no grossly visible inflammatory reaction, although the tissue is pale, the cortices are regular and well differentiated. The ureters are not thickened or dilated. The bladder contains a small amount of turbid yellow urine. The mucosa is smooth and white. The femoral veins are opened and the more distal portions are milked. No thrombi are expressed.

**Heart:** The heart is of normal size and configuration. The coronary arteries show moderate atherosclerosis without occlusion. The myocardium shows no degeneration, fibrosis, or necrosis. The valvular configuration is not remarkable. The pulmonary vessels contain no thrombi. The lungs show moderate congestion and edema, particularly in hypostatic regions. The bronchi and trachea are empty.

**Diagnosis:** Perforations and necrosis of ascending colon, probably traumatic, with acute subdural peritonitis. Operative repair of perforations and operative ileostomy. Appendectomy.

Pathological Department—Dr. Jesse Carr.

**Coronary System:** Sections show an unusual degree of sclerosis in all [7] the branches. There is also an advanced sclerosis of the splenic artery.

Bowel: The bowel and liver are as described by the autopsy surgeon and the ruptures of the bowel are closed by catgut sutures. The bowel adjacent to and in the areas of necrosis and suture show a hemorrhagic discoloration with a loss of structure, but there is no direct evidence of trauma seen here at this time.

Diagnosis: Perforation of the ascending colon with surgical intervention and generalized peritonitis. Toxic degeneration of the viscera.

Microscopic—Dr. Jesse E. Carr.

Coronaries: The coronary arteries show only a moderate sclerosis of the lumina and are patent. There are thrombi excepting in one artery where there is an aginal thrombosis of a portion of the lumen and a few erythrocytes and leukocytes adhere to one side of the vessel wall.

Bowel: Section of the bowel show a mucosa which is degenerating but which shows no infection. This mucosa is degenerating apparently because it is cutting off the circulation terminally but not early. From the basal layer of the mucosa and muscularis mucosa out the muscularis and mucosa show a gradually increasing grade of fibrino-purulent exudate and infiltration and the majority of the pathological change seen in these sections if first in the peritoneum, which it is oldest, and then extending into the muscle where it is more gradually developing. The lesions have not yet reached into the mucosa in an inflammatory sense.

Diagnosis: Peri-typhlitis, with perforation of the cecum and generalized peritonitis.

Operating Record—St. Francis Hospital, January 8, 1947, Dr. Russell C. Ryan.

Pre-operative Diagnosis: Acute appendicitis.

Surgeon: Dr. Russell C. Ryan.

Assistants: Dr. Musser, Dr. Charlton.

Details: Five days ago, this patient states that he had sudden abdominal pain, suggestive of an appendix, but for the four ensuing days took [8] cathartics and otherwise treated himself. He claims that prior to this he felt in perfectly good health. On the fifth day he was seen by Doctor Musser and ordered into the hospital. At that time he had severe and marked tenderness over his gall bladder region and in the lower right abdominal quadrant, where there was definite guarding and rebound tenderness. Rectal examination was negative. The man had an exceedingly fat abdominal wall and palpation at best was difficult. Tentative diagnosis of an acute appendix was made, although the possibility of a secondary cholecystitis was borne in mind. On the sixth day, and being no better, the patient agreed to an operation.

A right parallel rectus incision was made and on entering the abdomen there was a considerable amount of fluid. The appendix was found, and aside from a moderate amount of infection, was otherwise normal. It was routinely removed. A large mass, fully the size of an adult fist, was found in the upper center abdomen but rather deep. This mass had perforated and there was pus and fecal matter. The area was walled off and with a considerable amount of difficulty the mass

was removed. It appears to be a large diverticulum surrounded with omentum, but by reason of the further widespread and rather nodular elevations over the posterior abdominal wall, the possibility of a malignancy cannot be ruled out until a pathological report is obtained. The mass was enucleated, a toilet of the peritoneum attended to, and opening in the bowel from which issued fecal matter was closed in two layers of sutures. This apparently was about two inches long and an inch wide and seemed to be the base of the abscess mentioned above. After closing the bowel, the undersigned felt that there was a great question as to whether or not this bowel would open again or become obstructed; for this reason, brought the cecum to the abdominal wall and opened it (cecostomy). A drain was inserted deep under the abdomen, a generous quantity of penicillin was dispensed, as well as an equally generous amount of sulfa powder. The peritoneum was closed with two strands of No. 2 plain and fascia with stainless steel wire. [9] Retention sutures were placed and the skin closed with clips.

Pathological Report—St. Francis Hospital—January 8, 1947. Dr. K. B. Eichorn (†).

Patient—Peter Fotopulos.

This specimen consists of an irregular mass of hemorrhagic, fibro-fatty tissue 9.5 x 4.0 cm. in size and an appendix 6.- x 0.5 cm. in size. The mass of fat contains a large area of hemorrhage and necrosis with a soft, shaggy lining and measuring approximately 5.5 x 3.5 cm. There are addi-

tional adjacent patches of hemorrhage in this tissue. There are no evidences of tumor. One area of the specimen bears a fairly wide patch of fibrinous exudate on the surface. The appendix shows much fibrosis surrounding a pin-point lumen with a small amount of fecal matter in the more widely patent lumen of the proximal half of the organ. There is no evidence of active inflammation grossly.

Microscopic Diagnosis: Acute peritonitis with multiple abscesses, hemorrhage, and organization in fat. Healed appendix.

Note: There is no evidence of tumor nor of specific infection.

Roentgen Department—St. Francis Hospital—January 8, 1947. Dr. P. A. Miller.

Case No. 71236—Mr. Fotopulos.

Flat film of abdomen reveals no evidence of pathology.

[Endorsed]: Filed Jan. 27, 1948. [10]

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[Title of District Court and Cause.]

### ORDER

This case having been tried, argued, briefed and submitted for decision; and thereafter the court of its own motion having ordered the cause re-opened for the introduction of further and additional testimony with respect to the earnings of the deceased husband, Peter Fotopulos;

Now, therefore, the court being fully advised in the premises, finds:

(1) That on the 23rd day of December, 1946, on Van Ness Avenue near Bush Street, the defendant United States of [11] America, acting by and through its agents and servants, was negligent and the said negligence proximately caused and contributed to the injuries sustained by the said Peter Fotopulos which ultimately resulted in his death and that said death was proximately caused by the injuries sustained as aforesaid;

(2) That the deceased left surviving him his wife, together with two surviving children, Thomas Fotopulos and Joan Fotopulos, aged ten and nine years, respectively, plaintiffs herein, and that the wife herein and said children were and are entirely dependent upon deceased for their support and maintenance;

(3) That plaintiffs are entitled to the sum of \$50,000 as and for compensatory damages.

Wherefore, It Is Ordered that judgment be entered in favor of plaintiffs in the amount of \$50,000; plaintiffs to prepare findings of fact and conclusions of law.

Dated: April 9th, 1948.

GEORGE B. HARRIS,  
United States District Judge.

[Endorsed]: Filed Apr. 9, 1948. [12]

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The complaint herein was filed under the provisions and in accordance with the "Federal Tort Claims Act" of the United States of America of August 2, 1946, and this cause came on regularly for trial on the 4th day of December, 1947, before the Court without a jury, a jury not being allowed under the terms of said act.

Carroll S. Bucher, Esq., appeared as attorney for the plaintiffs and Frank J. Hennessy, Esq., United States Attorney, and Rudolph J. Scholz, Esq., Assistant United States Attorney, appeared as attorneys for the defendant.

## FINDINGS OF FACT

From the evidence introduced the Court finds the facts as follows, to-wit:

1. That on the 23rd day of December, 1946, Peter Fotopulos was of the age of 49 years and his life expectancy was [13] then 23.36 years.

2. That on said day he was the husband of Diamond Fotopulos, one of the plaintiffs herein and was the father of Thomas F. Fotopulos and Joan F. Fotopulos, minors, who are also plaintiffs herein.

3. That on said day Diamond Fotopulos was of the age of 29 years, Thomas F. Fotopulos was of the age of 10 years and Joan F. Fotopulos was of the age of 9 years.

4. That the said Peter Fotopulos and Diamond Fotopulos were married on November 24, 1935, and

on the 23rd day of December, 1946, the said Peter Fotopulos was the sole support of his wife, Diamond Fotopulos, and his children, Peter F. Fotopulos and Joan F. Fotopulos, plaintiffs herein.

5. That on December 23, 1946, Van Ness Avenue and Bush Street were and are public streets and thoroughfares in the City and County of San Francisco, State of California.

6. That the City and County of San Francisco, State of California, is located in and is a part of the Northern District of California, Southern Division, and is within the jurisdiction of this United States District Court.

7. That the said Diamond Fotopulos was duly and legally appointed guardian ad litem of the said Peter F. Fotopulos and Joan F. Fotopulos, minors, plaintiffs herein and all of the plaintiffs were, on December 23, 1946, and now are residents of San Mateo County, California, which county is within the jurisdiction of this court.

8. That on the 23rd day of December, 1946, one Charles A. Bailey was an employee of a federal agency of the United States of America, defendant herein, to-wit: a soldier of the Army of the United States.

9. That on the 23rd day of December, 1946, at about the hour of 9:30 a.m. of said day, the said Peter Fotopulos was driving [14] a Dodge automobile light truck in a northerly direction on Van Ness Avenue near Bush Street in said City and County of San Francisco, State of California, and at the same time and about the same place the



said Charles A. Bailey was driving a truck belonging to the Ft. Mason Post Motor Pool, United States Army, which was then an agency of the United States of America, defendant herein; that at said time and place the said Charles A. Bailey was acting in the course and scope of his employment as an employee of the said United States Army, the agency of the defendant herein.

10. That on the said 23rd day of December, 1946, as aforesaid, the said Charles A. Bailey, while acting in the course and scope of his employment as an employee of the said United States Army, did carelessly, negligently and recklessly drive and operate the said Army truck in a northerly direction on Van Ness Avenue so as to cause the said army truck to collide with the said Dodge truck then being driven and operated by the said Peter Fotopulos.

11. That as a proximate result of the said collision caused by the negligence, carelessness and recklessness of the said Charles A. Bailey, while acting in the scope and course of his employment, the said Peter Fotopulos sustained personal injuries consisting of a blow on the upper part of his abdomen, the force of which being transmitted inwardly caused a thrombosis in one of the mesenteric blood vessels. This interruption in the circulation to a portion of the transverse colon then proceeded to a necrosis of a portion of the wall of the transverse colon resulting in a perforation of the latter; that the said Peter Fotopulos was operated on January 8, 1947, by Russell Ryan,

M.D., and died on January 10, 1947, of a generalized peritonitis and a perforated transverse colon; that the said generalized peritonitis and ruptured colon were the sole and proximate result of the injuries sustained by him on December 23, 1946, and the sole and proximate result [15] of the negligence, carelessness and recklessness of the said Charles A. Bailey, while acting in the scope and course of his employment, as aforesaid.

12. That during the period between the accident on December 23, 1946, and the death of Peter Fotopulos on January 10, 1947, he, the said Peter Fotopulos, continually complained to his wife and family of abdominal pains and consulted a physician on January 3, 1947, who prescribed medicine for him.

13. That up to the time of the occurrence of the said collision and injury and continuously for an extended period prior thereto, the said Peter Fotopulos had been sound of body, physically robust and in good health.

14. That the said Peter Fotopulos was not careless or negligent in or about the accident aforesaid and did not operate the said Dodge truck in a careless or negligent manner and that no negligence or carelessness and no act or deed of the said Peter Fotopulos in any manner was the proximate cause of or proximately or in any manner contributed to the said accident.

15. That at the time of the aforesaid accident Peter Fotopulos was the sole owner and manager of a business known as the "P. F. Casing Co.,"

and for a number of years prior thereto had been engaged in the active operation and development of said business.

16. That the net earnings of the said Peter Fotopulos from the said business for the year 1943 amounted to \$7,552.55; for the year 1944 amounted to \$12,262.56; for the year 1945 amounted to \$15,195.92 and for the year 1946 amounted to \$18,316.08.

17. That after the death of the said Peter Fotopulos, his widow, a plaintiff herein, attempted to continue the operation of the said business but that the personal service contributed by the decedent to the said business during his lifetime proved to be an essential asset to the said business and following his death [16] it became impossible for his widow to operate the same except at a loss and she then terminated the same and received no value therefor.

18. That the said Diamond Fotopulos, plaintiff herein, has no property or income separate and apart from her community interests and she and her two children, plaintiffs herein depended solely upon Peter Fotopulos for their support.

19. That all of the allegations contained in the plaintiffs' complaint herein are sustained by competent evidence and are true and each and every one of the denials and averments contained in the answer of the defendant are unsupported by the evidence and are untrue.

20. That plaintiffs were damaged by reason of the accident to and the death of Peter Fotopulos

and by reason of the negligence of the defendant and its servant and employee Charles A. Bailey in the sum of \$50,000.00.

### CONCLUSIONS OF LAW

From the foregoing facts the Court concludes:

That plaintiffs are entitled to judgment against the defendant for the amount of \$50,000.00 with interest at the rate of 4% per annum from the date of judgment until paid, and for their costs herein expended.

Let judgment be entered accordingly.

Done in open Court this 25th day of May, 1948.

GEORGE B. HARRIS,

Judge of the U. S. District  
Court.

[Endorsed]: Lodged 5/17/48. Filed May 25,  
1948. [17]

In the District Court of the United States for the  
Northern District of California, Southern Division

No. 26833-H

DIAMOND FOTOPULOS and THOMAS FOTOPULOS and JOAN F. FOTOPULOS, Minors, by and Through Their Guardian ad litem,  
DIAMOND FOTOPULOS,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

### JUDGMENT

This cause came on regularly for trial before the Court sitting without a jury on the 4th day of December, 1947, Carroll S. Bucher, Esq., appeared for the plaintiffs and Frank J. Hennessy, Esq., United States Attorney, and Rudolph J. Scholz, Esq., Assistant United States Attorney, appeared as attorneys for the defendant, and the Court having heard the testimony, and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed:

1. That plaintiffs have judgment against the defendant in the sum of \$50,000.00 with interest

thereon at the rate of 4% [18] per annum from date hereof until paid.

2. That plaintiffs have judgment against the defendant for their costs herein taxed at \$27.00.

Dated this 25th day of May, 1948.

GEORGE B. HARRIS,  
Judge of the U. S. District  
Court.

[Endorsed]: Entered in Civil Docket May 25, 1948. Filed May 25, 1948. [19]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To the Plaintiffs in the above-entitled action and to Carroll S. Bucher, Attorney for the Plaintiffs:

You and each of you will please take notice that the defendant in the above-entitled action hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment given, made and entered in the above-entitled action and from the whole thereof, which judgment was entered and dated May 26, 1948.

Dated: July 21, 1948.

/s/ FRANK J. HENNESSY,  
United States Attorney,  
Attorney for Defendant.

[Endorsed]: Filed July 22, 1948. [20]

[Title of District Court and Cause.]

PRAECIPE FOR PREPARATION OF  
RECORD ON APPEAL

To the Clerk of the above-entitled Court:

Defendant having filed herein its Notice of Appeal in the above-entitled action, you are hereby requested to prepare record on appeal consisting of the following:

1. Complaint.
2. Answer.
5. Transcript of Proceedings in the District Court.
6. Medical Reports Offered by the Defendant.
7. Trial Court's Opinion.
8. Findings of Fact and Conclusions of Law.
9. Judgment.
10. Appellant's Statement of Points.
11. Notice of Appeal.
12. Clerk's Certificate of Transcript and Entry of Lodging Transcript with Clerk of Appellate Court.

FRANK J. HENNESSY,  
United States Attorney,  
Attorney for Defendant.

[Endorsed]: Filed Aug. 20, 1948. [21]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED  
UPON ON APPEAL

The Trial Court erred.

1. In finding the defendant United States of America negligent in the operation of its vehicle;
2. In finding Peter Fotopulos was not guilty of contributory negligence;
3. In finding that his death was caused by the collision;
4. In excluding evidence of other accidents or sickness;
5. In not finding how much of the disability resulted from the injury and what disability resulted from other causes;
6. In awarding excessive damages;
7. In that there is insufficiency of evidence to justify the trial Court's decision.

Dated: August 20th, 1948.

/s/ FRANK J. HENNESSY,  
United States Attorney,  
Attorney for Defendant.

[Endorsed]: Filed Aug. 20, 1948. [22]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and



including October 9, 1948, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: August 26, 1948.

MICHAEL J. ROCHE,  
United States District Judge.

[Endorsed] Filed Aug. 26, 1948. [23]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefore, it is hereby Ordered that the Appellant herein may have to and including October 19, 1948, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: October 8, 1948.

GEORGE B. HARRIS,  
United States District Judge.

[Endorsed]: Filed Oct. 8, 1948. [24]

District Court of the United States,  
Northern District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 24 pages, numbered from 1 to 24, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of Diamond Fotopulos, et al., Plaintiffs, vs. The United States of America, Defendant, No. 26833-H, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$6.00 and that the said amount has been charged against the United States of America.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 16th day of October, A.D. 1948.

[Seal]

C. W. CALBREATH,  
Clerk.[25]

In the Southern Division of the United States District Court for the Northern District of California

Before: Hon. George B. Harris, Judge.

No. 26833-H

DIAMOND FOTOPULOS, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT

Thursday, December 4, 1947

Friday, December 5, 1947

Appearances: For Plaintiffs: Carroll S. Bucher, Esq. For the United States: Rudolph J. Scholz, Esq., Assistant United States Attorney. [1\*]

Thursday, December 4, 1947, 10:00 A.M.

The Clerk: Case of Fotopulos vs. U. S. for trial.

Mr. Bucher: This is a case involving the death of one Peter Fotopulos.

The Court: What is the gentleman's name?

Mr. Bucher: Peter Fotopulos. The suit is brought by his widow, Diamond Fotopulos, in her own behalf, and as guardian ad litem of their two minor children. The testimony, we believe, will show——

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\* Page numbering appearing at foot of page of original certified Reporter's Transcript.

The Court: Has a jury been waived?

Mr. Bucher: The jury is not allowed under Federal Court Case Act,—

The Court: Yes.

Mr. Bucher: Shall I proceed?

The Court: Yes, you may.

Mr. Bucher: The evidence, we believe, will show that on December 23, 1946, a little less than a year ago, the deceased was driving his light Dodge pick-up truck north on Van Ness Avenue, and as he approached the intersection of Van Ness and Bush Streets, going north, the red stop light was against him, and he was in the inner lane, or next to the street car tracks, there being two driving lanes in addition to the street car tracks on Van Ness. Another truck was ahead of him in the same lane of traffic, which had already stopped for the red [2] light. The deceased stopped his truck behind the truck ahead of him, and after he came to a stop, an Army truck, driving in the same direction and following him, collided with the rear end of his Dodge truck, forcing him into the rear end of the truck ahead of him, damaging both the front and rear of the Dodge truck, and causing injuries which resulted in his death. The accident occurred, as I say, on December 23rd.

The evidence will show that he entered the St. Francis Hospital on January 7, a matter of two weeks later, that he was operated on January 8th by Dr. Russell Ryan and died on January 10, 1947. A stipulation has been entered into between counsel, which I shall file, admitting these facts: that at

the time of the accident, Peter Fotopulos was driving the Dodge pick-up truck involved in the accident, that he was then of the age of 49 years, and that his life expectancy on December 23, the day of the accident, was 23.36 years; that he was married to the plaintiff and guardian ad litem on November 24, 1935; that he left surviving him his widow, aged 29 years, and two children, Thomas F. Fotopulos, aged 10 years, and Joanne Fotopulos, aged 9 years; that he died on January 10, 1947; that at the time of the accident he was the sole owner of the business known as the P. F. Casing Company; that the net earnings of Peter Fotopulos upon which he paid Federal income taxes were as follows: For the year 1943, \$7872.55. Now the year 1944 is omitted from this, because we haven't that [3] record. But for the year 1945, his earnings were \$15,195.92. And for the year 1946, \$18,574.76. Further, that the plaintiff, who is the widow of Peter Fotopulos, has no property or income separate and apart from her community interest.

May I file the stipulation at this time?

The Court: Yes.

Mr. Bucher: That, if the Court please——

The Court: Is that stipulation signed by the Government's counsel?

Mr. Scholz: Yes, your Honor, it is signed by myself on behalf of Frank Hennessy. If Your Honor please, I would like to make just a brief opening statement. May I use your map for the purpose of this?

Mr. Bucher: Yes.

Mr. Scholz: It will be offered in evidence later?

Mr. Bucher: Yes, it will be. We prepared a map of the intersection.

(Map was then fastened to the blackboard.)

Mr. Scholz: If your Honor please, the Government's evidence will show that the Chevrolet light truck, 6 x 6, had stopped at Sutter Street, back here (indicating). It is not shown on this diagram. Then it proceeded approximately 15 miles an hour down Van Ness Avenue, along the inner lane of the east side of Van Ness Avenue, proceeding down here (indicating). [4] That Fotopulos' pick-up truck had been going along the outer lane, and that as it approached the safety zone indicated here (indicating), the Dodge pick-up sharply turned in front of the Army vehicle; that another vehicle had stopped because of the light, red light, here, and then went on, and nobody ever saw it any more. So that's out of the picture. That immediately upon the driver of the Army vehicle seeing this truck of Mr. Fotopulos cut in, applied his brakes in an attempt to slow, to stop the car to avoid hitting it. He succeeded, except that it caused a slight blow on the left rear sill of the Fotopulos car. In other words, the right front bumper of the Army vehicle hit the left rear of the Fotopulos car. It was a slight blow, and there was practically no damage done to either car because of the impact. The only damage to the Government vehicle was a scratch on the right front bumper, or more of a displacing of a little paint. The dam-

age to the Fotopulos car was very slight, although a bill will be presented showing a great deal of damage; but we will show it wasn't caused by this impact.

Therefore, the evidence of the Government will show that the damages, if any in this case, were caused by the negligence and the sole negligence of Mr. Fotopulos in cutting in from his lane in front of the Army vehicle, without taking proper precautions, and without safety. As Mr. Bucher stated, the accident happened on December 23, 1946, and that following an [5] operation, Mr. Fotopulos died on January 10, 1947. Whether or not his death could have been caused by that accident, I say is problematical. I assume that the plaintiff will produce some medical testimony to show that in the opinion of the medical expert, that it could have been caused by that. We will produce testimony to show that it probably wasn't, but there is a possibility. However, we do want to emphasize that the death was not caused—I mean that the impact was a slight impact, and not one that caused any particular damage at all to either the personnel or to the vehicles involved.

Mr. Bucher: May I proceed?

The Court: Yes, Proceed.

Mr. Bucher: May it please the court, we desire the privilege of calling out of order Dr. Russell Ryan, inasmuch as he has hospital cases.

The Court: Very well.

Mr. Bucher: Dr. Ryan, please.

RUSSELL C. RYAN,

called as a witness on behalf of plaintiffs; sworn.

The Clerk: Will you state your name to the court?

A. Russell C. Ryan.

Direct Examination

By Mr. Bucher:

Q. Dr. Ryan, are you a practicing surgeon in San Francisco? [6] A. I am.

Q. How long have you been practicing surgery?

A. I have been in the practice of my profession 36 years, and I have specialized in surgery since 1921, when I was made a Fellow in the College of Surgeons.

Mr. Scholz: If you wish, we will stipulate to his qualifications.

Mr. Bucher: The qualifications?

Mr. Scholz: Yes.

Mr. Bucher: Very well, thanks.

Q. Dr. Ryan, were you called upon to treat a man by the name of Peter Fotopulos on or about the 7th of January of this year?

A. Yes, I was, and my associate initially responded.

Q. Yes, and sent the patient into the hospital?

A. Yes.

Q. When did you first see the patient?

A. January 7, 1947.

Q. Where?

A. At the St. Francis Hospital.

Q. You made an examination? A. I did.



(Testimony of Russell C. Ryan.)

Q. Did you diagnose his condition from the examination you made at that time?

A. I made a diagnosis of the surgical abdomen.

Q. Did he give you a history?

A. He did. [7]

Q. What was the history he gave to you?

A. May I consult my notes?

Q. Yes.

A. (Consulting notes): He stated that approximately 9:30 a.m. on the morning of December 23rd, 1946——

Mr. Scholz: May I interrupt, your Honor, to ask one question?

The Court: Yes.

Q. (By Mr. Scholz): Were those notes made at the time or subsequently?

A. Well, very shortly afterward; I didn't carry my——

Q. Within a few hours?

A. Yes, well just afterwards. Well, I had some of the data and transferred that from my hospital to my office record, but this is my office record which I accumulated.

Q. That is a copy of your office record?

A. It is not a copy, it is my office record. It is a history of the case as I take it.

Q. That, then, is made in the ordinary course and approximately how long after the consultation?

A. Well, I would say just a very few days, when the case was completed. I can't recall how many

(Testimony of Russell C. Ryan.)

days afterwards, but in the course of the practice of medicine, you don't write your history every day, but at the end of the week you have all your history completed for the next week, so far as you are [8] able, and all I can say now is that as to the best of my recollection this was made a very few days afterward, but from the records that I took at that time, at the hospital, and I transferred those to my office records, which I have here.

Q. (By Mr. Bucher): All right, proceed, Doctor.

A. He stated that at approximately 9:30 a.m. he was driving a truck and he stopped at a "Stop" sign, and while stopped he was struck from the rear with some force, and this caused him to strike his upper abdomen on the steering unit of his truck. He felt some pain, which he described as considerable at the time, but was able to ambulate. The symptoms gradually became worse, and he was seen by another physician at his home, and he was seen once by that doctor, and he continued to get worse. Then after a few days, he sent for me and my associate, Dr. Musser, was sent down, and Dr. Musser found that he had a general peritonitis, a surgical abdomen, and immediately sent him into the hospital.

The Court: How many days elapsed, Counsel?

The Witness: Your Honor, that was——

The Court: Three days?

The Witness: No, it was several days. That was the 7th of January, and he had been injured on

(Testimony of Russell C. Ryan.)

the 23rd of December. During that time he gave a history of gradually getting worse. I wanted to immediately operate on him, but he refused. And the following day his condition was very much worse, and he [9] finally consented, and I considered several things—the possibility of a ruptured appendix or a ruptured gall bladder. I did not make a definite diagnosis, except a surgical abdomen, and then—do you wish me to recite my finding, at the operation?

Q. Yes, will you proceed? You operated, did you?

A. I operated.

Q. On the 8th of January?

A. That is correct.

Q. Now, will you proceed and explain the operation, and what you found?

A. Well, I operated, I opened the abdomen, I found a lot of free fluid, and his appendix looked infected, and I just routinely took that out in preparation of attacking a large mass which I found in the upper abdomen, and there was a hole in the transverse colon, or the transverse part of the large bowel, a necrotic hole which had been walled off by the omentum, as we call it, which is a large apron of fat which nature uses to wall off inflammatory conditions around the appendix, or in any part of the abdomen. There was a quantity of fecal matter and pus in the abdominal cavity. And I then repaired the opening in the bowel as best I could, and then I brought the first part of the large bowel to the surface, and I made an anti-

(Testimony of Russell C. Ryan.)

ficial rectum, if you please, so that gas and intestinal contents would not cause pressure on this area [10] that I had repaired in the bowel—hoping that it might heal. But the patient passed away.

Q. He died, did he, on the 10th—two days later?

A. That is correct.

Q. Now, in your opinion, Doctor, was death the result of the condition in which you found his bowel to be at the time you operated?

A. Yes, that was the cause of death.

Q. Yes. Did you find a thrombosis, or a clotting of the blood vessel?

A. I found a picture, as I have the pathological report here, which led me to the very definite conclusion that this man had suffered a thrombosis or a clotting in one of the blood vessels, the superior mesenteric, which supplies that part of the colon, and there was a gradual shutting off of blood supply with a necrosis of the bowel, and a final perforation of the bowel, the perforation of this necrotic area in the bowel wall. That is what caused his death.

Q. And the perforation of the bowel was the condition that allowed the fecal matter to exude into the abdominal cavity?

A. In to the abdominal cavity. And I have the report, pathological report, here of the specimen that was removed and examined in the laboratory subsequently.

Q. Yes. Now, Doctor, I understand it is your opinion that if there was an injury, the injury then

(Testimony of Russell C. Ryan.)

was to the blood vessel, [11] itself, or the superior mesenteric artery, is that true?

A. That is correct, that is a well-recognized entity.

Q. It is?           A. It is.

Q. Then if I am not mistaken, the failure of the artery to supply the transverse colon with blood caused a necrosis to form and later an opening in the colon?           A. That is correct.

Q. Is that correct?

A. It depends on the size of the branch involved, and it depends on the amount of collateral circulation, but if that is insufficient, there is a gradual failure of nutrition of the intestinal wall, with a final necrosis.

Q. In other words, then, after the injury, a small clot may be formed, which during later days may enlarge—the clot, itself, may enlarge?

A. Build up.

Q. Until finally it shuts off the blood supply in that artery completely, is that right?

A. That is correct.

Q. Doctor, having in mind the history which the patient gave you, of a trauma on the 23rd of December, what is your opinion as to whether or not the trauma was the proximate cause of the condition which you found at his death?

Mr. Scholz: Just a minute, I think that is objectionable, [12] if he is going to give his opinion purely from the history that was given to him by Mr. Fotopulos, don't you think? It is my sug-

(Testimony of Russell C. Ryan.)

gestion to the court that if he has read the pathological, neurological, and all these other records, that based upon that, I don't think it should be based on only parts.

Mr. Bucher: I didn't intend to, I will amend my question.

Q. Not only the history which he gave you, but upon the reports of the pathologist and the reports of the autopsy surgeon, what is your conclusion?

A. My conclusion is that this patient, as he stated in his history, received a blow in the abdomen, that he had a subsequent clot form in one of the nutrient vessels of the wall of the colon, he had a necrosis following that, and died as a result.

Q. In other words, then, is it your opinion from all of the facts you know about this case, that the original trauma on the 23rd of December was the proximate cause of the condition which you found on operation, and of his death?

A. Very definitely, yes.

Q. You have no doubt about it in your mind?

A. Not in my mind, there isn't any doubt.

Q. Does the extended period between the 23rd of December and the 7th of January, when you were first called in, in any manner, in your opinion, negative your conclusion?

A. No, because the process which was initiated at the time of [13] the injury progressed to the point of where the bowel wall finally broke down

(Testimony of Russell C. Ryan.)

and the condition as I found it at operation was the final and terminal result. But during that time, the patient had symptoms, and this condition was progressing to the point where I found it.

Q. Doctor, have you had occasion to recently read an article by Merl B. Crown, of the Mount Zion Hospital, New York City, on the traumatic origin of abdominal diseases within this year?

A. Yes, that was in the Journal of Gastroenterology, and the doctor has a 5 or 7-page article. He is also connected with the New York Post Graduate School, where I did some work, and these conditions are relatively so frequent that he has written quite an article on them, and that is a matter of record, and that article focuses on this condition.

Q. On the traumatic cause?

A. That is right.

Mr. Bucher: That is all, if the Court please.

Cross-Examination

By Mr. Scholz:

Q. Dr. Ryan, in your direct testimony, if I state it correctly, I wrote it down, but sometimes I don't write too correctly, your history was that Mr. Fotopulos gave you, that he struck his upper abdomen by the steering wheel?

A. He told me by the steering wheel, yes.

Q. Now, the pathology, you read the pathology report, did you not?

A. Yes, I have it here, as a matter of fact. [14]

Q. And the pathology shows that it was in the lower quadrant, does it not? In other words, if

(Testimony of Russell C. Ryan.)

he was struck by the steering gear, it would be in the upper part of his belly—or—I don't know what your technical name would be, it would be up here (indicating), the upper part right below the breastbone, the chest?

A. That is where, presumably, he was struck, from what he said.

Q. But now the pathology was down in the lower quarter? A. Oh, no.

Q. The pathology was not down there?

A. No; I mean, I read the report, but I don't recall what it said as to location. But it said—

“This specimen consists of an irregular mass of hemorrhagic, fibro-fatty tissue 9.5 x 4.0 cm. in size and an appendix 6.0 x 0.5 cm. in size. The mass of fat contains a large area of hemorrhage and necrosis with a saft, shaggy lining, and measuring approximately 5.5 x 3.5 centimeters. There are additional adjacent patches of hemorrhage in this tissue. There are no evidences of tumor. One area of the specimen bears a fairly wide patch of fibrinous exudate on the surface. The appendix . . .”

Now, this is another specimen, you see. I took the appendix out.

“. . . shows much fibrosis surrounding a pinpoint [15] lumen with a small amount of fecal matter in the more widely patent lumen of the proximal half of the organ. There is no evidence of active inflammation grossly.” That is referring to the appendix.



(Testimony of Russell C. Ryan.)

“Microscopic diagnosis: Acute peritonitis with multiple abscesses, hemorrhage, and organization in fat. Healed appendix.”

And then below:

“Note: There is no evidence of tumor of specific infection.”

Nothing is mentioned there of any location, and this mass that I took out and which has been reported on, I took out of the upper abdomen.

Q. Well, then, from your knowledge, you would say that the complaint was vested in the lower quadrant of the abdomen?

A. Well, his complaint, he had a general peritonitis—his complaint was all over.

Q. I don't mean his complaint, but I mean that the pathology was not vested in the lower quadrant of the abdomen (indicating)?

A. Well, if I understand correctly, you mean when I saw the man?

A. No, I mean from the pathological report you just read now, would you say that that was, that the pathology was concerned with the upper part of the abdomen, or the lower quadrant of the abdomen? [16]

A. Well, the pathology, the specimen as removed from the abdomen concerned the upper abdomen, but of course the whole abdomen was a general peritonitis when I went in. I didn't take any specimen—you see, the peritoneum is the link of the abdominal cavity, and but that mass that I took out came from his upper abdomen.

(Testimony of Russell C. Ryan.)

Q. Well, the injury, you say, from your knowledge of the case, from reading the microscopic report, the pathological report, and the neuroscpic report, that the injuries in the lower part of the lower quadrant of the abdomen?

A. No, I would not. This is a report on the mass that I took from his upper abdomen.

Q. Dr. Ryan, you treated Mr. Fotopulos before this accident, did you not?

A. I have no record, but I have a faint recollection; just some minor thing, something like a cold. I don't recall anything of a serious type at all.

Q. Did you know the condition of his previous health prior to the time that you saw him on January 8?

A. Not immediately, no.

Q. He was about 5 feet 2, was he not, and weighed about 189 pounds?

A. I can't—I know that he was a short and rather a chunky man, yes.

Q. Wouldn't you say he was obese? [17]

A. No, I wouldn't say he was obese, but he was overweight, he was over average weight.

Q. Now, Doctor, in your opinion as an expert witness, could not this death have been caused by any other thing beside a blow on the abdomen which it was reported he received on December 23, 1946?

A. Well, if I may digress a moment to make my answer plain, from what I found and what I saw, I would say no. The thrombosis of the mesenteric vessels has occurred in other things—and

(Testimony of Russell C. Ryan.)

I might take an example, hemorrhage in the brain. We know that many people go to bed at night and are apparently in good health and that they suffer a stroke of paralysis right in bed. They have a hemorrhage in the brain. Or a thrombosis. Or they might be out playing golf, but on the other hand, if you have a man who is in average good health and he is struck on the head and he has a hemorrhage of the brain, and if you find no other cause for it, you are going to ascribe that hemorrhage in the brain to the blow on the head, if there are no other causes present as far as you can see. And so it is in this case; I found no other definite reason for this man having the necrosis. He gave a definite history of a blow, he said he had pain afterward, and he had a gradual developing picture from the time of that injury. He had no diverticulum or diverticulitis, which sometimes produces a picture—he had no other signs in the abdomen that I found that could explain it, and we find in the laboratory report, the pathological report, the report by the pathologist, of multiple hemorrhage, which were somewhat organized, showing that they were of some few days, several days, standing; and the picture as I look at it, was very definitely, could be very definitely, ascribed to that injury.

Q. Doctor, as I listen to your testimony, I think your [18] reasoning is from one event to the next event and soon, is that right, and then you come to your conclusion?

A. Well, as you go along in a case from one

(Testimony of Russell C. Ryan.)

point to another, I think that is the way to do.

Q. But that doesn't always follow, that merely because the events precede each other that the cause and effect precede each other, isn't that correct?

A. Well, I think that is a pretty safe rule to follow, that events do follow one another in orderly sequence in a case, and that is why we, in surgery, lay so much stress on a history.

Q. And then you evolve from that there, that the cause of death was the effect of the blow on his abdomen on December 23, is that correct?

A. Yes, and I believe this article that was just brought to my notice here, that I had read, this is quite frequent; this man has written a recent article on it.

Q. Well, Doctor, I am not familiar with the article. I have been trying to keep up with the medical testimony—so I can't ask you on something I don't know anything about. Doctor, he stated that he was struck, or that he had a blow on the upper abdomen on December 23. Did he state what kind of blow that was, whether it was a hard or a slight blow?

A. Well, I will read just as I put it down at the time.

Q. Well, no, what you put down, Doctor, was simply that he was struck in the abdomen, but it did not state whether it was a [19] heavy blow or a slight blow, if I recollect.

A. Well, he said he felt some pain, parenthetically.

(Testimony of Russell C. Ryan.)

Q. Well, I am talking about the blow; that is, confine yourself to the point there.

A. Well, I can only say that he had a blow which gave him considerable pain. I couldn't say as to the force of the blow.

Q. You don't know what the force was?

A. I don't think anybody could. I would have to take the man's statement.

Q. Well, Doctor, as a matter of fact, there was no visible evidence of any blow at all?

A. No, and that is very frequently the case, as this article we referred to will show you; serious abdominal evidence might be found without any external evidence of trauma. That is not unusual at all.

Q. And from your preliminary examination, you could not find any symptoms of internal or external injury, could you?

A. Oh, I found, when I first saw the man, a very widespread evidence of internal damage. The man had general peritonitis, his abdomen was as rigid as this floor (indicating), he had a surgical abdomen in a very advanced stage.

Q. Did you find any evidence of external or any symptoms of external injury?

A. No, just his rigid abdomen, and as I say, I haven't it in my notes, but I recall that he did give a history of passing [20] some blood from the bowels. I think the hospital records, if I am not mistaken, will show that.

Q. There was a hole in the bowel?

A. There was a very big one, yes.

(Testimony of Russell C. Ryan.)

Q. And did you not testify before the coroner's inquest that you found quite a hole in the bowel?

A. Yes.

Q. And then they asked you, was it possible that hole was caused by the trauma on December 23, and your answer was, "Well, if it was due to the mesenteric. . . ." (hesitating). A. "thrombosis."

Q. It is possible that it was?

A. That is right. I don't recall, but I know that would be my testimony.

Q. Doctor, if the evidence develops that there is merely a slight blow on the abdomen, of the upper part of the abdomen, you would still adhere to your opinion that his death was caused by that slight blow on the abdomen on December 23?

A. Yes, and may I give an explanation for my answer?

Q. If you wish.

A. I would like to. Even a blow that would be relatively slight, there is a case by Dr. Nassinger and Dr. Howard Fleming on record—I believe there are only seven cases like it—like a carpenter patient of mine; I was finally called in to see him. He had been working on a ladder and a man working above [21] him——

Mr. Scholz: I am sorry. Does Your Honor want to listen to this?

The Court: Well, you consented to the illustration.

A. (Continuing): There was a carpenter work-

(Testimony of Russell C. Ryan.)

ing just three rungs above him, and something slipped and hit this man a glancing blow on the scalp, apparently a very slight injury. That man went on working and finally developed symptoms which, two or three other doctors described as influenza and sleeping sickness, and it got worse and worse, and about six months later, I was called in and I found it was entirely out of my field, and I called Dr. Howard Fleming. He was with Dr. Nassinger at that time; they operated on the man and found at the time of that operation that the man's brain was not much larger than three hen's eggs, and there was in his skull this massive hemorrhage which had, over a period of several months, compressed his brain, and they put that case on record as being due to that relatively slight blow with the hammer. But that hemorrhage had lasted several months, and he had an atrophied brain, and I would say that this thing would come from what you would at the time consider an insignificant blow, and it could develop into a very significant picture.

Q. Well, then, Doctor, as I understand your testimony, there is nothing that could have happened between the days of this so-called accident on December 23 and the date he died or that [22] you operated, the date he died, January 10, that could have caused his death other than this blow, the magnitude of which either you or I don't know?

A. Oh, I wouldn't say that, no; I didn't get

(Testimony of Russell C. Ryan.)

any history of anything else happening and what I found was very definitely explained by what had happened, but I wouldn't say that nothing else could have happened to him in the meantime, but I found no evidence of anything else happening to him.

Q. Well, then, I misunderstood your direct testimony; I asked you that question, if there was any other causes brought forth that could have caused death except the light blow on the abdomen, and I understood you said no. Now, as I understand you now, it could have happened, but you had no evidence?

A. Well, I misunderstood you, I am sorry. I understood that you asked me if anything else could have happened to him. Well, I suppose something else could have happened to him, but I didn't find any evidence of anything else happening to him, and I found a very complete picture of what did happen to him, in my opinion.

Q. Do you know whether or not he worked from the time he was injured up to the time he saw you on January 7?

A. No, I don't know how long he did work. I know that he carried on, after he left the point of injury at the time of injury. I understand he drove his truck away. Then I don't know how many days later, or when he did it, but shortly afterward he [23] called in a doctor in South City, and he said he saw that doctor once and that the doctor gave him some medicine. He said he was no better and



(Testimony of Russell C. Ryan.)

then he went along a few days by himself, getting worse, and then he finally sent for help.

Q. And that was Dr. Wirthheim, do you know?

A. Yes, I met the doctor the other day.

Q. The gentleman here in the courtroom, Doctor?

A. Yes, that is right.

Q. And then you don't know what kind of work he was doing prior to or after he saw you?

A. No, I didn't go into that.

Mr. Scholz: That's all, Doctor.

Mr. Bucher: I have no further questions. May the doctor be excused?

Mr. Scholz: Yes.

If Your Honor please, with the consent of the Court and counsel, I have some doctors coming, one of which is here now, and they are rather busy. If it would be possible that I could call him out of order and have all the medical testimony given now?

Mr. Bucher: No objection.

The Court: All right. Are you calling the doctor as your witness, Mr. Scholz?

Mr. Scholz: This is my witness, Your Honor.

### MORRIS WIRTHHEIM

called for the United States, sworn.

The Clerk: Will you state your name to the Court?

A. Dr. Morris Wirthheim.

The Court: Proceed.

(Testimony of Morris Wirthheim.)

Direct Examination

By Mr. Scholz:

Q. Doctor, you are a practicing physician and surgeon here in the State of California, duly licensed to practice as such?

A. Yes, I am—since 1940.

Q. And——

Mr. Scholz: Will you stipulate to his qualifications, or do you want me to go into his history?

Mr. Bucher: I will not stipulate to his qualifications as an expert in general surgery.

The Court: Ask the doctor his background.

Q. (By Mr. Scholz): What is your background, Doctor?

A. I did general practice and surgical work since 1912. I was physician and surgeon in the First War and practiced since 1940 in this country.

Q. Did you know Peter Fotopulos during his lifetime?

A. I have treated him before. He was my patient before this time.

Q. And did he come to see you after December 23, 1947?

A. I have seen him only once, January 3, 1947.

Q. When?

A. Third of January. Yes, the only time I have seen him.

Q. And at that time what was the occasion of his visit to you?

A. He came to my office, I think, on the 4th and said I should come over to see him, and then

(Testimony of Morris Wirthheim.)

he came to my office, as far as I remember; he phoned first, then when he came to my office, he told me, said he had an accident on the 23rd of December, and that he felt some kind of discomfort in his upper part of his stomach. I examined him. He told me about the kind of accident that he was struck from behind, he was shaken. I can't tell if he told me just against the steering wheel—anyhow, he had an accident, with the feeling that he got an injury of the stomach. He had no symptoms of vomiting or peritoneal, no external injury, no findings of an internal injury what could make possible a rupture or a severe injury of the bowel. He had no fever. I wrote down that he had a blood pressure of 148-98. That was about according to his age of 49 years. His urine was normal, his weight without overcoat, 189 pounds. I advised him only to rest and diet. There was no reason for suspicion of a severe injury what could need hospitalization or surgery. Then I didn't hear anything more about the case.

Q. Doctor, have you read the pathological and the microscopic and the neuroscopic?

A. The post mortem report. [26]

Q. Is that right? Have you read the report in this case?

A. Yes, I read that.

Q. Now, do you believe from that report that this injury could have been caused by a slight blow on the abdomen on December 23 of 1946?

Mr. Bucher: If the Court please, we object to the question on the ground that no foundation has

(Testimony of Morris Wirthheim.)

been properly laid qualifying this man as an expert in surgery.

The Court: Sustained.

Q. (By Mr. Scholz): Doctor, what, in your opinion—have you operated, have you performed the duties of a surgeon for a period of time?

A. I did surgery.

Q. How many years?

A. Many years, since 1912 to about 1925. Then I did it only occasionally.

Q. Have you done it very much the last few years? A. Not the last years.

Q. Not the last years?

A. No, not during the last years.

Q. I see.

Mr. Scholz: Does Your Honor feel that he is not qualified on that?

The Court: Well, where was he educated?

A. Originally in Germany, and then I studied again in California. [27]

Q. What school in Germany did you graduate from?

A. I graduated from Kiel, 1912, and then I graduated again in 1940 from the University of California.

Q. 1940? A. '40.

Q. Are you a member of any of the societies?

A. Yes, County Medical Association, San Mateo, and the County Medical Association of San Francisco.

Q. Are you a member of the American College of Surgeons?

(Testimony of Morris Wirthheim.)

A. No, I am no specialist, I am a general practitioner.

Q. Have you examined the pathological findings?

A. I read the report about it.

Q. Have you read all the reports on the subject?

A. I think that was a complete report, which I got last week.

Mr. Scholz: Yes, Your Honor, I have a complete report of the pathological.

The Court: I think perhaps the doctor is qualified to express an opinion generally on the subject, subject to cross-examination.

Mr. Scholz: And the weight, of course, is a matter of——

The Court: Counsel may cross-examine wider.

Q. (By Mr. Scholz): Doctor, after reviewing the complete report and the full report in this case and reading all the report and knowing the history of it, do you think, in your opinion, that his death was caused by a slight blow on the abdomen [28] on December 23, 1946?

A. After I read the report and after my formal examination, and after he has not been sick before, there is no other explanation, if you look for an explanation at all, what could have caused the trouble; the report only mentioned a hardening of the blood vessels. That is the only pathological finding in the report. The post mortem showed that there was a rupture of the large bowel. It could be possible that was caused by a blood clot or thrombosis, closing off the blood supply to the

(Testimony of Morris Wirthheim.)

large bowel; and it might also be caused by an injury, but I am unable to say anything definite about it. It is a possibility. There is no real explanation what else could have caused it.

Q. What other causes could be the reason for his death than the blow to his abdomen on December 23, 1946?

A. Infection processes, ulcers, but there was no finding of an ulcer of the bowel.

Mr. Bucher: Pardon me. If the Court please, may I please have that last word?

The Court: "Infection processes." Or he said there was nothing in the report that they found an ulcer and there was no infection.

A. (Continuing): No, no diverticulitis. Dr. Ryan mentioned that, they didn't find any diverticulum that could cause it. Then the only thing mentioned in the report is sclerosis in the blood [29] vessels in his abdomen, but it could be possible that by thrombosis in the blood vessels, secondary drying up of the wall of the large bowel, could cause a rupture, could make a weak spot with secondary rupture, but nobody can tell that for sure.

Q. Then, as I understand your testimony, Doctor, it is possible that this blow in the abdomen could have caused his death, it is possible?

A. It is possible.

Q. But now, in your opinion, was it probable?

A. It is only a possibility.

Q. I understand you stated it is a possibility, but I ask you now, Doctor, as an expert witness,

(Testimony of Morris Wirthheim.)

is it, in your opinion, that it was probably caused by the blow on the abdomen on December 23?

A. Probably—if that means the same like possible.

Q. No, probably and possibly doesn't mean the same.

A. It is more——

Q. Possibility, as I understand it, Doctor, so we have a community of thought on the words—and I may be wrong—possibility is that it could happen, but probability means that the assumption is that it did happen that way, at least that is what I have in mind when I asked you these questions.

A. Yes, there is a certain degree that it could be caused by the accident; probably that it could be caused to a certain degree, maybe 25 per cent or 30 per cent by this accident. Is that what you expect?

Q. Well, Doctor, not quite that way. Possibility means that it is, no matter how remote it could be, there is something that might cause it.

A. Yes, sure.

Q. But probability means that there isn't any remoteness, that it is more—the indicia is that it was definitely caused by that.

A. There was no other sickness before in his stomach, since there must be a certain degree, that it is probably the cause to a certain degree—it is caused by the accident after there was no other cause except the hardening of the blood vessels.

Q. I didn't quite get that. Did I understand you to say that it was probably caused by the accident?

A. Accident, regarding that there is no other definite cause for the perforation of his bowel.

(Testimony of Morris Wirtheim.)

Q. Oh, I understand you. In other words, if there is no other cause for the perforation of the bowel, then it must have been caused by the accident?

A. Then it is more probable that it is caused by the accident.

Q. But is there any other causes that could intervene, from reading this history, that could intervene in this case so it was not caused by the perforation of the bowel?

A. Abnormal changes in the blood vessel—that is up to the [31] pathologist to decide if there was such a degree of changing, since the blood vessels, that could explain the necrosis. The report doesn't show that it is such, and that it is far advanced hardening of the blood vessels.

Q. I am not quite sure of what you mean.

A. It is difficult to decide that question. I think nobody can decide the question.

Q. In other words, as I understand your opinion, you mean that nobody can come up and state, no doctor can come up here and state, that this was caused by the accident or it was not caused by the accident?

A. I should think we could say that nobody could decide that it was not caused by the accident. There is no other explanation, and we can't definitely say it is caused by the accident, but we can't tell for sure that it is not caused by the accident. We have nothing else sufficient to explain the hole perforation. The other explanations are not sufficient to say that it caused a perforation of his



(Testimony of Morris Wirthheim.)

bowel. Therefore, we come back to the cause what we know, and maybe the accident was the cause. We can't say it was definitely not the cause, that it is impossible.

Q. I think I understand you now.

A. It is difficult. I think it is more than we should testify.

Mr. Scholz: That is all, Doctor. [32]

### Cross Examination

Q. (Mr. Bucher): I merely want to clear up one or two things, Doctor. You didn't see him again after that one visit, did you?

A. I have seen him only once.

Q. And that was at your office or at his home?

A. In my office.

Q. I see. And all you know other than that is what you have read in the pathological report, is that true?

A. That is all what I heard afterwards.

Q. Yes.

Mr. Bucher: That is all, if the Court please.

The Court: You may be excused.

Mr. Bucher: Do you have any other witnesses?

Mr. Scholz: Yes. Dr. Cooper, will you take the stand?

### SIDNEY PRESTON COOPER

called for the United States, sworn.

Q. (The Clerk): Will you please state your name to the Court?

A. Dr. Sidney Preston Cooper.

(Testimony of Sidney Preston Cooper.)

Direct Examination

Q. (Mr. Scholz): Dr. Cooper, what is your profession? A. I am a surgeon.

Q. You are a chief surgeon at where? [33]

A. United States Marine Hospital.

Q. And how long have you been the chief surgeon there?

A. About two and a half years now.

Q. You are admitted to the practice of medicine in the State of California? A. Yes, I am.

Q. How long?

A. I think approximately a year and a half.

Q. And when were you first admitted to the practice of medicine?

A. 1929 in the State of Ohio. I have been in the Public Health Service ever since 1929.

Q. And are you specializing in surgery?

A. Yes, sir.

Q. Now, did you read all the report, the pathological and the microscopic and the neuroscopic reports on Peter Fotopulos?

A. No, sir, I didn't read it all. I glanced over it.

Q. You haven't read that full report yet?

A. No, sir.

Q. Wasn't this matter taken up with you by a Dr. Hollingsworth, at that time a staff meeting---

A. This was taken up at a staff meeting, and I was one of those who attended the staff meeting.

Q. And you were not acquainted with the full reports, then?

(Testimony of Sidney Preston Cooper.)

A. No, sir, not fully acquainted with them.

Mr. Bucher: Well, then, if Your Honor please,— [34]

The Court: I suggest a short recess. Doctor, you can that way acquaint yourself with the medical reports.

(Recess.)

Q. (Mr. Scholz): Dr. Cooper, during the recess you have finished reading the reports on this case, have you? A. Yes, sir.

Q. Now, doctor, isn't it a fact that in accident cases where there is an abdominal injury occurs, that some internal organs is ruptured?

A. Abdominal injuries may cause rupture of internal organs.

Q. Now, in this case, they allege that there was an internal rupture, did they not?

A. That is the record.

Q. And if that is so, wouldn't the result and the symptoms of such an injury appear shortly thereafter?

A. They almost always do appear immediately.

Q. And in the lapse of time, the lapse of time in this case, would indicate that blow on the abdomen on December 23, 1946, was not the cause of death?

Mr. Bucher: Well, if the Court please, I don't want to interpose unnecessary objections, but I do believe, instead of leading the witness—this witness is able to testify properly.

The Court: Yes, I think so, counsel.

(Testimony of Sidney Preston Cooper.)

Mr. Scholz: I am leading him, frankly, because I have not had the opportunity to talk to him. It was rather a surprise [35] that he was produced this morning. I anticipated another doctor.

The Court: Well, I would suggest, counsel, that you refrain, so far as you are able, from leading the witness.

Mr. Scholz: Yes, sir.

Q. Doctor, you recall that there was a mention in the report of the diverticulitis?

A. I remember glancing over the pathologist's report, and it was either in a previous report or it was discussed at the staff meeting, that there was a diverticulum found at some time, either by the coroner or the pathologist. Now, I can't see it in this report.

Q. Assuming that this was found, what is a diverticulum?

A. It is a protrusion, a diverticulum of the large bowel is a protrusion of the mucosa through the wall of the large bowel, and these perforate rather frequently.

Q. Now, would a diverticulum then be caused, necessarily be caused by a blow?

A. They are rarely caused by blows. As a matter of fact, we don't know the cause of them. They are usually congenital.

Q. Now. Doctor, if there is an abdomen injury on the 23rd of December, 1946, and there is no exterior symptoms of that and no complaint until approximately January the 3rd of the following year,

(Testimony of Sidney Preston Cooper.)

would you say that that could have been, would be the result of a blow on the abdomen? [36]

A. I couldn't be specific in either direction, because it could be, but would not be probable. Now the reason I say that, I have seen injuries that manifest themselves, a serious manifestation, much later than the injury. or instance, a ruptured spleen. You may have pain immediately, a small amount, moderate amount of shock, and then three weeks or months later, you can have hemorrhage from the spleen, that we assume was caused by the original accident.

Q. Doctor, calling your attention to the pathological report of Dr. Carr, which I believe states that the examination of cross section of the colon from the area of rupture does not show any direct evidence of trauma. That is as to that one area; would not that area show evidence of trauma, if it was the result of a blow on the abdomen?

A. I couldn't, I would say there would be difficulty telling with that length of time.

Q. You couldn't tell yes or no?

A. No, this man obviously had a peritonitis from the report that I read. And he obviously had perforations.

Q. Now, in that case, would the area of injury extend to the inner layer, in your opinion?

A. I mean, it is impossible to say a man was injured the 23rd of December, and on the 7th of January that you can tell whether an injury, with peritonitis, extended through the three layers of

(Testimony of Sidney Preston Cooper.)

the bowel. At least, I am not a pathologist, but as a [37] surgeon, I couldn't tell. If you want me to summarize to you—may I give my opinion on this thing? I can do it in about two minutes, and it will be either I don't know, or I do know something about it, and that way I can get through here.

The Court: Is there any objection on that?

Mr. Bucher: No objection.

A. This man, from the report I read, gives the history of a generalized peritonitis. He had one or more perforations, one was described as a transverse colon. According to the description, one was also in the secum. Also in the report, it said in one place that he had an ileostomy, which is a bringing out of the distal part of the small valve. The doctor testified this morning, and I heard, that he did a colotomy, or secostomy, which is right next to that. It is the beginning of the large bowel. Now, this man had perforations—two at least. He had generalized peritonitis, inflammation of the bowels and intestines and everything inside his abdomen. Now, the most common cause for that, if you exclude appendicitis, if you call the appendix not a part of the large bowel—which it is, but excluding that, the most common cause, ordinarily in a man, is age. This man's age was 45 or 50?

The Court: 49.

The Witness: All right. The most common cause would be carcinoma, cancer of the valve, diverticulis and probable trauma, in that order. And by

(Testimony of Sidney Preston Cooper.)

a trauma I mean injury. Now, [38] from the history, I can not say that this man did not have a perforation which walled off and then opened up again and then got into peritonitis later on. The other doctor testified he had no signs of peritonitis after he saw him, which was soon after his injury. He had no signs of peritonitis. Now, this thing could have perforated, could have walled off, opened up again and given him signs of peritonitis. My own opinion, from this, is that he had a diverticulitis and either the pathologist missed it or they found it and it hasn't been reported. Now, I don't know, I am not a pathologist, I think they will admit they sometimes miss a diverticulum. I have missed them as a surgeon and pathologists have found them.

Q. But in your opinion, was it diverticulitis that he had?      A. Probably.

Mr. Scholz: I think that's all.

### Cross Examination

Q. (Mr. Bucher): If this man gave a history of a trauma on the 23rd of December, 1946, and thereafter, beginning that same day, he progressively complained of pain in the abdomen every day, which got worse and on the third day of January went to a doctor, was given some medicine and the condition again became progressively worse until the seventh day of January, when he was operated upon; and in the event the pathologist's report showed and the operating surgeon found a perforation of the transverse colon, wouldn't it be

(Testimony of Sidney Preston Cooper.)

your opinion, with that history, that a [39] clot had formed in the superior mesenteric artery which feeds the transverse colon, if I am correct?

A. That is right.

Q. It does?           A. It does.

Q. And wouldn't it be your opinion that a clot had formed just at the junction of the mesenteric artery with the transverse colon which finally became walled off, preventing a supply of blood to the transverse colon and causing a rupture of the colon?           A. It would not.

Q. Why not?

A. For the simple reason that my opinion is based upon my experience as a surgeon, and I have never seen a case like that. That doesn't prove that there aren't any, that is my experience. Now, No. 1, I take the most common cause first. No. 2, I can't conceive of a thrombosis of one of these small arteries not being found; that is, small enough that it wasn't found by the coroner. That is to say, without having a more diffuse finding, pathologically. In other words, they ought to find it where one or two of these small ones break off with such an excellent collateral blood supply to the large valve. I don't think it would cause ulcers or perforations.

Q. Well, do you call the superior mesenteric artery a small blood vessel? It leads from the aorta to the heart, doesn't [40] it?

A. It leaves the aorta.

Q. I beg pardon?



(Testimony of Sidney Preston Cooper.)

A. It leaves the abdominal aorta.

Q. And follows through to the transverse colon. It is the main artery, isn't it, supplying the colon?

A. It certainly is, and I know where it is, because——

Q. Yes, of course.

A. But it branches out in thousands of minute branches.

Q. And that is true. But you don't mean——

A. I mean to insinuate that if that was stopped down here at the lower part, then you would have gangrene of not a tiny little ulcerated area described in centimeters or millimeters, but you would have gangrene of the whole bowel or the whole loop of the bowel.

Q. Well, but didn't you understand Dr. Ryan to testify that there was a diffuse condition throughout that section filled with pus and poison and fecal matter?

A. Which could be caused by a diverticulum or carcinoma or a whole lot of other things.

Q. Yes, so as far as you know there was no evidence of carcinoma or cancer, is there?

A. That is not evident in the report, right.

Q. And so far as you understand it, there was no evidence in the pathologist's report of a diverticulum, is that true? [41]

A. I believe, sincerely believe that I saw a report of a diverticulum either when this thing was shown to me first, or later. I don't see it in this re-

(Testimony of Sidney Preston Cooper.)

port. Now, that is my honest opinion. I think there was a mention of a diverticulum.

Q. But if there was no evidence introduced here of a diverticulum, you then would be of the opinion that the trauma being the third in line, in your opinion, might be the cause of the accident, is that true?

A. My opinion is that it might be the cause, correct—that it might be the cause.

Q. But in the absence of any other history of illness, you then still believe that the weight is against that being the cause and that it was caused by some other condition?

A. That's right.

Q. Even though the man was apparently in good health otherwise, prior to that time?

A. Yes, he gave a history of passing blood, which is very common.

Q. After the injury?

A. I don't know whether it was afterward or before.

Q. Well, if the history was of passing the blood after the injury, would that affect your opinion?

A. No, it wouldn't affect my opinion one way or the other, it would be a symptom of either.

Mr. Bucher: That's all. [42]

THOMAS F. CRAHAN

called for the United States, sworn.

Q. (The Clerk): Will you state your name to the Court, please?

A. Thomas F. Crahan.

(Testimony of Thomas F. Crahan.)

Direct Examination

Q. (Mr. Scholz): Doctor, with the suggestion of counsel and with the permission of the Court, I will try to make this very brief. You have read these reports, have you, Doctor?

A. I have.

The Court: For the purpose of the record, identify the report, counsel, identify the particular reports that the doctor has read, so that we may have it.

Q. (Mr. Scholz): The neuroscopic report, the pathological report and the microscopic report.

A. I have.

Q. Now, Doctor, to sum it up, would you state, after reading the report and hearing the testimony here this morning, what is your opinion as to the cause of the death of Mr. Fotopulos?

A. The cause of the death was given by the coroner. He said it was a generalized peritonitis following a localized abscess in the abdomen.

Q. In your opinion, Doctor, could that have been, or was it caused by a blow in the upper part of the abdomen on December 23, 1946? [43]

A. Well, it is conceivable.

Mr. Bucher: I beg pardon?

A. (Repeating) It is conceivable. It might be due to that.

Q. In your opinion, was it caused?

A. Oh, I couldn't say with any degree of certainty whether it was or not.

(Testimony of Thomas F. Crahan.)

Q. Doctor, in your opinion, would that be the probable cause of the death?

A. After you rule out a multiplicity of other indications and then you come to the facts at hand, then you possibly could conclude that the cause of death was attributable to trauma.

Q. What are the other conditions that you would have to rule out?

A. You would have to rule out carcinoma.

Q. Well, wait a minute. Let's take that. Carcinoma—was any evidence of carcinoma in there?

A. Not from the report of the pathologist who saw the original section that was removed at operation.

Q. Then you don't think that would have any effect on his death, then?

A. Not carcinoma, no.

Q. All right, that's out. What is the next one?

A. Diverticulosis, diverticulitis.

Q. What was that last one?

A. Diverticulitis, which is nothing more than—

Q. Was there any evidence of diverticulitis?

A. Not from the pathological report that I read. The hospital pathologist described the lesion is a localized abscess around the transverse colon, and that is as far as he went. Now, sometimes an inflammatory condition progresses to a point where it destroys the original point of attack so that you don't know what went on. You can surmise, you can theorize, but that is as far as you can go.

Q. In other words, you can't definitely say it was one thing or the other, is that correct?

(Testimony of Thomas F. Crahan.)

A. That is correct.

Q. Would a person whose death was caused as indicated in this report be able to be active in his business and around from the time of the injury up to January 7?

Mr. Bucher: If the Court please, I object to that question, as there is no foundation, no evidence to the effect that this man was engaged in business until the 7th of January.

The Court: Sustained.

Q. (Mr. Scholz): Well, assuming this——

Mr. Bucher: May I ask this, then? I think that the evidence will be brought out later in our own time, and assuming for the present that he was active from December 23 to January 7.

Q. Assuming those things, Doctor, would that indicate that his death was caused by a blow on the abdomen, the upper part of [45] the abdomen?

Mr. Bucher: Same objection, if the Court please.

The Court: Sustained.

Q. (Mr. Scholz): Doctor, if the death was caused as indicated in this report, would that have been caused by a body—I mean, by a person striking the upper part of his abdomen against a steering wheel?

A. I couldn't say that. It might be the result of trauma. Is that what you are trying to ascertain?

Q. Yes. In other words, there is nothing definite one way or the other?

(Testimony of Thomas F. Crahan.)

A. Just from the reports that I read, there is nothing definite.

Q. That's right.

Mr. Scholz: That's all.

Mr. Bucher: No questions.

The Court: You are excused.

Mr. Bucher: Call Mr. Duba.

### JOHN DUBA

called for the plaintiff, sworn.

Q. (The Clerk): Will you state your name to the Court?

A. My name is John Duba, D-u-b-a.

Mr. Bucher: May it please the Court, counsel for the defense has agreed with me that the itemized invoice of job [46] order No. 28490 of the J. E. French Company covering the repairs to the Dodge truck driven by the deceased may be introduced into evidence. Is that correct, counsel?

Mr. Scholz: Yes. In other words, if that was done, I have no objection to that being entered into evidence.

You can identify that?

The Witness: I have my original estimate here.

Mr. Scholz: Just ask him. I can't stipulate, but I have no objection.

### Direct Examination

Q. (Mr. Bucher): Mr. Duba, did you bring with you under subpoena a copy of the itemized invoice of job order No. 28490?

A. Yes, (producing papers).

(Testimony of John Duba.)

Q. I hand you this and ask you if that is——

A. I will have to reverse this. It is on the other side. There is an error in here, I see.

Q. Well, have you a copy, Mr. Duba, of your invoice?

A. I have the original bill here.

Q. You have the original bill?

A. There is an error here, I notice. I never looked at this one at all.

Q. All right, Mr. Duba, what is your occupation?      A. As an estimator.

Q. Employed by whom?

A. J. E. French Company. [47]

Q. Was that your position on the 23rd of December last?      A. Yes.

Q. And as such estimator for J. E. French, did you have occasion to examine a Dodge truck owned by the P. F. Casings Company on the 23rd of December?

A. Yes, I remember the thing clearly. As I was sitting there——

Q. Did you make an examination of the Dodge truck?      A. First I totaled it.

Q. I beg pardon?

A. I estimated the car as a total.

Q. What do you mean “as a total”?

A. As a total car beyond repairs.

Q. Oh. Then did you estimate and examine the particular damage to the front and rear end of the car, the truck?

A. I don't remember. I have went through with

(Testimony of John Duba.)

an insurance adjuster. He came out here and specified what he wanted done to the car.

Q. Well, can you state to the Court what damage, in a brief manner, what damage was caused to the front of the truck?

A. Well, according to these bills here, it says the whole front end.

Mr. Scholz: Well, just a minute, not according to the bills.

Mr. Bucher: No—Strike that.

Q. Mr. Duba, from the records that you brought with you, are [48] you able to state now, from your recollection as to the general damages to the truck?

Mr. Scholz: You mean caused by this accident?

Q. (Mr. Bucher): Caused by this accident on the 23rd of December.

A. Well, the only thing is, the cab, between the cab and the pickup body, it has dropped right in the center.

Q. Now, what is the damage to the front of the truck, roughly?

A. Well, both front fenders and the grill——

Q. And the grill smashed? A. Yes.

Q. Now, what was the damage to the rear of the truck? A. The tailgate, I imagine.

Q. The tailgate. Was there any more damage to the lefthand corner of the Dodge truck than there was to the righthand corner of the Dodge truck?

A. Oh, that I don't know.

Q. Well, can you tell, from your repair bills, what you repaired?



(Testimony of John Duba.)

A. Well, it doesn't say anything about any of the rear fenders, no.

Q. Does the body of the Dodge truck extend back beyond the fenders in the rear?

A. What was that again?

Q. Does the body of the Dodge truck extend to the rear beyond [49] the fenders?

A. No. The body is inside the fenders.

Q. The fenders protrude? A. Yes.

Q. And now you say there was a damage to the tailgate?

A. Yes, there was damage to the tailgate here and the rear cab.

Q. And the rear what?

A. The rear cab. That was due to when the body, the rear pickup body, went down and hit the cab.

Q. Yes, but was there damage to the tailgate, was there evidence of damage to the tailgate showing that it had been struck by another vehicle?

A. Oh, I wouldn't know that. We have replaced the tailgate and the rear tail light lens and all that.

Q. And there was no evidence of any greater damage to the left rear corner than there was to the right, is that true? A. That's right.

Mr. Bucher: That's all.

### Cross Examination

Q. (Mr. Scholz): Mr. Duba, you don't know yourself, personally, what the damage was caused by in this accident, do you? A. No.

(Testimony of John Duba.)

Q. You were not in the accident at all, you were not at the [50] scene of the accident at all?

A. No.

Q. And all you are going by in the repair bill, is that correct? A. Right.

Q. But you did examine the **truck**, did you not?

A. Yes.

Q. And did you not find that the frame member had been so badly corroded that it was paper-thin?

A. That's right.

Q. And that the heavy metal had been placed on the floor of the body and that apparently when the frame buckled, the extra weight of this metal plate caused damage to the rear of the cab?

A. That's right. It dropped right down.

Q. And resulted in breaking the rear support?

A. The motor support.

Q. The motor support, making it impossible to drive, is that right? A. That's right.

Q. And you examined the body, frame, did you, to see that the corrosion was so great on the gas tank that it had to be replaced—that it was so thin due to corrosion, not the accident?

A. Well, the gas tank was rusted, but the owner had to pay for that himself. [51]

Q. I know, but that was due to corrosion, that had nothing to do with this accident? A. No.

Q. In other words, the whole car was very badly corroded due to certain acids that had been transported for a long period of time in it?

A. I wouldn't say the whole car, just the chassis.

(Testimony of John Duba.)

Q. But most of the damage was caused by the corrosion? A. That's correct.

Q. And most of the repairs, is that correct?

A. Yes.

Q. And as a matter of fact, it was corroded so badly that you could put your finger through the gas tank, could you not?

A. Oh, I don't know about that.

Q. Well, if it hadn't been for this corrosion, practically the only thing that could have happened in this accident would be damage to the rear tailgate?

A. Oh, I don't know. The front end was damaged, too.

Q. Was that caused by the corrosion with the blow or solely by the blow?

A. That must have been by the blow.

Mr. Bucher: I couldn't understand that.

Mr. Scholz: "It must have been by the blow."

Q. And is it a fact that the only damage you could find actually caused by any impact was the tailgate, is that correct? [52]

A. Yes. Tailgate and hinges, yes. I guess we had to repair them, the hinges and all that.

Q. The hinges where?

A. On the rear tailgate.

Q. That's right, the hinges on the tailgate and the tailgate. That was the only damage that could have been caused by any impact?

A. That's right.

Mr. Scholz: That is all.

(Testimony of John Duba.)

Redicert Examination

Q. (Mr. Bucher): Mr. Duba, did you repair the rear body sill? A. Yes.

Q. Was that caused by the accident?

A. The rear body sill, there are several of them. That is caused—no, by the body as it came down. They busted.

Q. And did you repair the rear motor support housing? A. Yes.

Q. Was that caused also by the caving in of the frame?

A. By the caving in of the frame, right.

Mr. Bucher: That is all.

Recross-Examination

Q. (Mr. Scholz): Well, the rear part there, the sill, was that the frame member that was badly corroded and a heavy metal plate had been placed on the floor of the body of the car? [53]

A. Well, that was wood, sir.

Q. Pardon? A. That was wood.

Q. Well, wasn't a heavy metal plate, had not a heavy metal plate been placed on the body or the floor of the body of the car? A. That is right.

Q. And the extra weight of that plate, together with corrosion, caused the damage to the rear of the cab?

A. Yes, it sank right down.

Mr. Scholz: That is all.

The Court: You may be excused.

Mr. Bucher: Mr. Failor.

HARRY A. FAILOR

called for the plaintiff, sworn.

Q. (The Clerk): Will you state your name?

A. Harry A. Failor.

Direct Examination

Q. (Mr. Bucher): Mr. Failor, what business are you in?      A. Transportation.

Q. Automobile transportation?

A. That is right.

Q. How long have you been in that business?

A. About 20 years. [54]

Q. Twenty years?

A. Uh-huh (affirmative).

Q. Where is your place of business located?

A. 525 Jones.

Q. On or about the 23rd day of December last, do you recollect an automobile accident which happened at the intersection of Bush Street and Van Ness Avenue?      A. Yes, I do.

Q. Where were you at that time?

A. I was at the used car establishment there, the Neil McNeil, 1350 Van Ness. That is right this side, on the south side of Bush Street on the west side of the street, or the east side of the street, rather. I was sitting at a desk there when I heard quite a crash.

Q. Pardon me just a minute. Referring to the diagram, do you refer to the location marked Used Cars?      A. That's right.

Q. At the intersection?      A. That's right.

Q. Now, will you proceed and tell what happened?

(Testimony of Harry A. Failor.)

A. Well, I was sitting, as I say, at a desk in the used car establishment there and heard quite a crash and ran out to see what had happened. As I got out there, I noticed a Ford pickup truck in the pedestrian lane this side of the zone, passenger zone, and an Army truck directly behind it. [55]

Q. A Ford pickup truck?

A. A Ford pickup truck.

Q. Was that a Dodge?

A. Well, it could have been a Dodge, as far as I know. It was a small pickup, anyway.

Q. All right.

A. And the Army truck was parked right behind it, and the Army people there, out of the truck, I believe, there was a woman with them, and a couple of army youngsters and the gentleman that was driving the pickup truck was arguing with them about the accident. The fellow said, "Well, my brakes didn't hold," or "I couldn't help it."

Q. The man who was driving the army truck said that?      A. Army truck.

Q. Now, Mr. Failor, will you take these small slips that I have which resemble automobiles, and will you place the location of the Dodge truck as it was when you went right out, as you saw it?

A. This is supposed to be——

Q. This is the safety zone.

A. This is the safety zone?

Q. No, this is the safety zone in here. This is the first line, and this is the second line. Here is

(Testimony of Harry A. Failor.)

your one line and here is your second line.

A. This is the line this side of the safety zone, is that [56] correct?

Q. That's right. East.

A. Well, there is where the rear of this pickup truck was, right about in here.

Q. Now, will you press that in there? Now, will you locate the position of the army truck at that time?

(Witness complied.)

Now, will you resume your seat.

(Witness returned to witness stand.)

Q. Mr. Failor, I notice that you have placed the Dodge truck to the north of the pedestrian crosswalk, to the north. This is the north?

A. That's right.

Q. And directly behind it you have placed the army truck and the two are in parallel, or one is exactly ahead of the other, is that correct?

A. That's right.

Q. Were there other cars in the east of the two lanes?      A. Yes.

Q. There were other cars in here?

A. Some were parked at the curb.

Q. Now, some were parked at the curb. Then were there other cars in the lane, in the traveling lane to the east?      A. Yes.

Q. There were. Do you know whether the red light was on at [57] that time against the Van Ness Avenue traffic?      A. I wouldn't know.

The Court: At the time of the impact?

(Testimony of Harry A. Failor.)

Mr. Bucher: He wasn't present at the time of the impact.

Q. How long would you say it was from the time you heard the crash until you went out?

A. Immediately.

Q. A matter of seconds? A. That is right.

Q. Was anyone with you?

A. I think Jud McNeil might have been with me.

Q. Who? A. Jud McNeil.

Q. Jud McNeil went out with you also. Now, do you know—Strike that. Mr. Failor, how long had you been located in business at Van Ness and Bush?

A. I am located at 525 Jones Street.

Q. Well, were you located here also at that time?

A. I was temporarily associated with McNeil.

Q. You were. And have you had occasion to observe this intersection many times in the past?

A. Quite frequently.

Q. I will ask you if you know what "Stop" and "Go" lights at the northwest corner of the intersection of Bush and Van Ness, whether they can be seen by an automobile from Sutter Street to [58] the south as it approaches Bush Street (indicating)?

A. It all depends as to whether there is a street car in your line of vision, or not.

Q. If there is no street car in your line of vision, can you see it?

A. I am not positive, but I believe you can.



(Testimony of Harry A. Failor.)

Q. You believe you can. Were there any passengers in the safety zone at the time, do you remember?

A. When I went out there there were.

Q. Pedestrians, I should say. When you went out there there were?

A. There were some people.

Q. Was there any street car on the tracks?

A. I didn't notice that.

Q. You didn't see any. Now, Mr. Failor, from your experience as an automobile transportation man during the years, would you say, in your opinion, having in mind the location of the cars as they were at rest when you first saw them, that it was possible that the Dodge truck, the one ahead, cut in from the right ahead of the Army truck and was struck on the left rear corner of the Dodge?

Mr. Scholz: Just a minute before you answer that. Object to that, as it calls for the opinion and conclusion of the witness.

The Court: Sustained. [59]

Q. (Mr. Bucher): You didn't see any truck ahead of the Dodge when you went out, did you?

A. No, I didn't.

Q. Now, did you observe the damage to the front and rear of the Dodge truck?

A. I didn't observe the damage to the front of it, but I noticed the rear tail gate was smashed, and it was bent in the middle.

Q. You mean the truck, itself, was bent in the middle?

A. Yes.

(Testimony of Harry A. Failor.)

Q. And the tail gate was smashed in?

A. Yes.

Q. And you didn't observe the front of the truck? A. No.

Mr. Bucher: That's all. You may take the witness.

### Cross-Examination

Q. (Mr. Scholz): Mr. Failor, I believe you testified that you did not see any other trucks or any other vehicles in the immediate vicinity of the two, of the Army car and the Dodge pickup, at the time that you first saw this accident?

A. When I walked out there, there were vehicles against the curb and this side of the Army truck (indicating).

Q. Vehicles along here? (Indicating.)

A. That's right.

Q. Would you indicate where these vehicles were on the diagram? [60]

A. Here's three rows of them.

Mr. Bucher: The court can't see where he is.

A. (Continuing): There are three rows of vehicles.

Q. Would you mark it in there approximately the same size you have there, indicate something like this so you will have it? Write this in.

A. Take this to be the curb here, the cars were parked in here and there was another row of cars along in here (indicating). This was in the third, I would say the third car from the curb.

(Testimony of Harry A. Failor.)

Q. As I understand it, then, there was cars parked along the curb at the point indicated by this line, here?      A. That is right.

Q. Then we will mark that Defendant's 1. Shall I make that a little bit heavier, so the court can see it?

The Court: Use a red pencil, Mr. Scholz.

(Witness marked diagram.)

Q. (Mr. Scholz): And then there were other cars parked, a row of cars parked along here (indicating)?

A. This side of it. There is three lanes there.

Q. Well, there are actually two lanes, are there not, but the cement comes out there, which is a parking lane—isn't that correct?

A. From the the curbing. One lane, and then there are two lanes of traffic.

Q. Is that right, two lanes of traffic? Will you indicate [61] with this red pencil where that row of cars was when you first saw this accident?

A. Well, when I came out there were three lanes of cars parked, one against the curbing and one in the center here, or one this side of the safety zone (indicating).

Q. In other words, then there were also a car parked, which I will designate as Defendant's No. 2.

Mr. Bucher: He said "the cars in there."

Mr. Scholz: Cars.

A. (Continuing): The signal was evidently "Stop."

(Testimony of Harry A. Failor.)

Q. (Mr. Scholz): Well, how far did they extend? I don't want to——

A. Well, I would say two or three cars down, because I walked through the first and second cars to come over here.

Q. Will you write that in, because I don't know, I wasn't there.

A. Well, I will say there was a couple of cars, about two or three cars down this way, because I walked out there from here and through here (indicating).

Q. Then just to make this a little bit clearer, that's Defendant's No. 2 (marking diagram), indicating a series of three cars parked when you first came out, is that correct?

A. That's right.

Q. Mr. Failor, do you remember that you were visited by an agent of the FBI approximately 8/21/47?

A. I remember there was somebody up there from them. [62]

Q. And do you remember that you made a statement, apparently you made this statement to him, that you had no recollection of seeing any other trucks?

A. No. Any other trucks—there were passenger cars that I saw along there.

Q. And that you could not recall whether there were any other cars on the curb lane? A. No.

Q. You did not make that statement?

(Testimony of Harry A. Failor.)

A. Not to my knowledge, because I walked through two cars to get out there.

Q. Now, Mr. Fotopulos came into your place of business there on Van Ness Avenue?

A. I wasn't there, but I was told that he came in there.

Q. Oh, you don't know whether he came in?

A. I saw him come in, but I didn't talk to him. He wanted to use the phone there, I think Jud McNeil was there.

Q. He came into there to use the telephone, is that right?      A. That's right.

Q. But you were not there at the time?

A. I don't believe so.

Q. Well, did you see Mr. Fotopulos?

A. I saw him walk in the building. I was standing in front then.

Q. That is the only time you saw him on that day?

A. Only time, other than when he was arguing with the drivers. [63]

Q. And was he arguing with the drivers after he had used your telephone, or after he came into your place of business to use your telephone?

A. Before.

Q. And when he came into your place of business to use the telephone, where were you at that time?      A. Standing in the doorway.

Q. And when you heard the crash, did you stand at the door?

A. I was inside when I heard the crash, and ran out. I was at a desk.

(Testimony of Harry A. Failor.)

Q. And there was a loud crash, was there?

A. Considerable; I ran out to see what happened.

Q. Did Mr. Fotopulos appear to be injured in any way?      A. Not to my knowledge.

Q. Where was Mr. Fotopulos standing when he was arguing with the driver of the Army car?

A. This side, in the center of the two trucks.

Q. Will you indicate that on the diagram?

A. Right about in here (indicating).

Q. We'll make that "X" and designate that Defendant's No. 3. That is where Mr. Fotopulos was standing when you first saw him?

A. When I came out there were the three of them arguing.

Q. And where was the driver of the Army vehicle standing?

A. Right in the circle with them. The three of them were together. [64]

Q. Will you indicate with an "X" there?

A. All three were in the circle.

Mr. Scholz: We will put another "X" right there, and that's where they were, that's Defendant's Exhibit 4 (marking diagram).

Q. And where were you standing at at that time that you heard this conversation?

A. Right near there, practically next to them.

Q. Will you indicate where you were standing?

A. Right in back of them, practically, right in here (indicating).

Q. The only damage you saw to the automobile of Mr. Fotopulos, as you recall, your statement was

(Testimony of Harry A. Failor.)

that the rear tail gate was broken and also there was a sway in the rear sill?

A. That's right. Not in the rear sill, in the body, itself.

Q. Well, the rear body?

A. In the frame. The body was bent up like this (indicating).

Q. In the rear?

A. Not the body, the whole line of the frame.

Q. The whole line. And that is the only damage you saw? A. That is all.

Mr. Scholz: That is all.

Mr. Bucher: No further questions.

Q. (The Court): You examined the interior of the cab?

The Witness: No, I did not. [65]

Q. You did not examine the steering apparatus at all? A. No.

Q. To determine whether it was on the same level or on an angle? A. No, I did not.

The Court: All right.

(The witness was excused.)

The Court: We will take the noon recess now. We will resume at 2:15.

(A recess was thereupon taken until two-fifteen o'clock p.m. this date.)

Afternoon Session, December 4, 1947, 2:15 p.m.

The Clerk: Case of Fotopulos, et al, v. United States, on trial.

Mr. Bucher: Mr. McNeil, for the plaintiffs.

JUSTIN L. McNEIL,

called as a witness on behalf of plaintiffs; sworn

Q. (The Clerk): Will you state your name to the court, please?

A. Justin L. McNeil.

Direct Examination

Q. (Mr. Bucher): Mr. McNeil, you are in the used car business in San Francisco?

A. Yes, sir.

Q. Located on the east side of Van Ness Avenue, between Sutter and Bush?

A. That's right.

Q. You have seen the diagram that has been put on the blackboard, have you?

A. I see it now. I haven't seen it before.

Q. And your place of business, as I understand it, is in that section marked "Used cars"?

A. That's right.

Q. Now, Mr. McNeil, do you remember anything unusual that happened at the corner of Bush and Van Ness Streets on December [67] 23, 1946, in the morning?

A. Well, there was an accident involving a Dodge pick-up and an Army truck.

Q. Where were you at the time of the accident, if you remember?

A. Well, I believe I was in the office.

Q. At your place of business? A. Yes.

Q. Did you hear any crash or collision of automobiles?

A. Yes, there was quite a crash out in front.



(Testimony of Justin L. McNeil.)

Q. What did you do?

A. Well, I walked to the front of the door and walked out in the street where the cars, where they had the wreck.

Q. Now, Mr. McNeil, will you indicate to the court the positions of the cars when you first saw them, when you went out? You may illustrate to the court. Or I might say, the two cars now placed on the board were placed there by the witness Harry Failor. Do those two cars, in your opinion, represent the position of each car at the time they came to rest?

A. Well, I would say pretty close.

Q. Well, what do you mean by "pretty close"?

A. Well, I don't quite think that that Dodge was up as far as Harry has it there.

Q. You mean you don't think the Dodge was quite as far toward the north as he has placed them?

A. That's right. [68]

Q. But were the two cars in an absolutely straight line with each other, or was either car on an angle?

A. No, they were both one behind the other.

Q. One was exactly behind the other. Did you observe any damage to the front or rear of the Dodge truck?

A. Well, the front.

Q. You can take your seat, if you will.

(The witness resumed the witness stand.)

A. (Continuing): The front of the truck, the grille had been pushed in, but whether that had been done by this accident, I don't know, because

(Testimony of Justin L. McNeil.)

there was no car in front of the Dodge truck when I seen it.

Q. There was no car in front of the truck at that time?

A. The back end of the truck had been damaged.

Q. Was the damage to the back of the truck as much on the right side as it was on the left side?

A. Well, it possibly could have been a little more on the left side, because it looked to me like the man in the Army truck had tried to swerve to the left in order to avoid him, so it could have been more to the left than it could to the right.

Q. But the Dodge car was absolutely parallel in the street car tracks, was it?

A. That's right.

Q. And the Army truck, as you saw it—

A. Was right behind him. [69]

Q. Square behind him?

A. He might have been a little bit to the left behind him, but they were right in a line.

Q. Now, how far would you say the Dodge truck, the rear of the Dodge truck, was from the front of the Army truck when they came to rest?

A. Well, when I saw it, I would say about eight or nine feet apart, but they had drifted apart by the time I got there. I mean, maybe one of them had backed up a little bit.

Q. Now, were there other cars in the east lane of Van Ness Avenue going toward the north?

A. That's right.

(Testimony of Justin L. McNeil.)

Q. At that time? A. That's right.

Q. Would you say how many there were?

A. I would think there was three in the lane and there were two parked at the curb.

Q. Abreast of the three in the lane?

A. That's right.

Q. Do you know whether there were any pedestrians in the safety zone?

A. No, that I don't know.

Q. You don't remember? A. No.

Mr. Bucher: That's all, if the Court please.

Mr. Scholz: Q. Mr. McNeil, with your permission I will remove these, so I will be able to write in. I will indicate on the outside at the same spot. Will you come down here and indicate, using approximately the size of this here (indicating), the position of the Dodge car when you first saw it?

A. Well, I would say that the front was right about here.

Q. Use about the same size, to indicate, the same size, about, as this (indicating).

Mr. Scholz: Can the Court see?

The Court: That's all right, I can see it.

A. In other words, the front end was about in the middle of the crosswalk?

Mr. Scholz:

Q. Yes. Well, mark what you indicated here as the position of the Dodge car, Defendant's No. 5.

(Witness marked.)

Q. Now, will you indicate the position of the Army vehicle when you first saw it?

(Testimony of Justin L. McNeil.)

A. I would say the Army vehicle was about like that (indicating).

Q. Thank you very much. We will mark that.

A. (Continuing): I might say that there were eight or nine feet between them, there.

Q. Well, change it and make it whatever you think is correct. Now, this is on scale. You know what that means.

Mr. Scholz: Do you have a scale here? [71]

Mr. Bucher: Yes. (Presenting to Mr. Scholz.)

Mr. Scholz: Q. Wait a minute, before you put that in, the scale on this is 8 feet to an inch. So you can say that is 8 or 9 feet, so here would be an inch. That would be the front of the back here. This is 8 feet and this is 9 feet, about here (indicating).

A. This here was about, I would say, about 8 feet between the two cars at the time I saw it.

Q. Then Defendant's No. 6 indicates the position of the Army vehicle at the time that you first saw it?

A. Yes.

Q. And Defendant's No. 5 indicates the position of the Dodge pick-up truck when you first saw it?

A. Yes.

Mr. Scholz: Will you resume your seat?

(Witness resumed the witness stand.)

Mr. Scholz: Q. As a matter of fact, wasn't the greater portion, if not all, of the Dodge pick-up outside of the line, the passenger lane running across Van Ness Avenue?

A. No, I don't believe it was.

(Testimony of Justin L. McNeil.)

Q. You did not see the accident, did you?

A. No, I didn't.

Q. Don't you have some recollection that there was another truck in front of the Dodge and the Army vehicle when you first saw it? [72]

A. No, I never seen the car in front of them. There might have been a car there.

Q. Didn't you state to the FBI agent, the agent of the FBI, that you saw around the latter part of August—that is when it was, wasn't it?

A. Yes.

Q. And didn't you state to him that you had some recollection that there was another truck in front of the pick-up of the deceased, but that you could not definitely remember?

Mr. Bucher: If the Court please—

A. No.

Mr. Bucher: If the Court please, I request that counsel, for impeachment purposes, fix the time and place and who was present.

The Court: Did the witness make those statements in writing, written statements?

Mr. Scholz: No, your Honor, this is the statement to the FBI. Mr. Lightbody, who will be here this afternoon.

The Court: You might state the time and the place.

Mr. Scholz: I have not the exact date, the date of the report is August 21, 1947.

Q. But you recall Mr. Lightbody or an agent of the FBI talking about it to you, about this case?

(Testimony of Justin L. McNeil.)

A. I recall talking to him.

Q. When was that time that he talked to you?

A. That I don't know.

Q. Was it approximately in August?

A. I couldn't be sure.

Q. At that time that he talked to you, did you recall that you made that statement to him?

A. No, I told him that I thought there might have been a car there from the grille being pushed in on the truck.

Q. And do you recall making this statement to him also, that you were not sure, but that you believed that there was a car in the curb lane?

A. No, there was cars in the curb lane, but no cars on the street car tracks that I remember.

Q. No, I didn't say "street car tracks."

A. There was cars in the curb lane.

Q. That the pick-up, after the accident, was either very near the pedestrian cross-walk or partially into the cross-walk—did you make that statement?      A. That's right.

Q. And is that true?      A. That's right.

Q. Then the pick-up, after the accident, was either very near the pedestrian cross-walk or partially into this cross-walk?

A. Well, as near as I remember, it was partially into the cross-walk.

Q. You did not spend much time observing the accident, did you? [74]      A. No, I didn't.

Q. There are many—they are rather a frequent occurrence in that intersection?

(Testimony of Justin L. McNeil.)

A. We have quite a few of them there.

Q. Did you observe the rear of the Dodge pick-up?  
A. Yes.

Q. And did you notice any damage on the left rear of the Dodge pick-up?

A. No, it seemed to be in the tail gate and the body of the truck seemed to be bent up.

Q. Did you notice any damage to the Army vehicle?  
A. No, I did not.

Q. You didn't see any at all?  
A. No.

Q. Did you look at it?  
A. I looked at it.

Q. Did you notice that in the Army vehicle the mud was knocked off the front bumper?

A. No, that I didn't.

Q. Then the only damage, that I understand you testified to, is that you noticed the tail gate and the frame?

A. Yes, the body of the truck had been bent up, or the frame had been bent.

Q. Did you notice if the car was very much corroded?  
A. No, I did not. [75]

Q. I believe you testified on direct examination that the damage was on the left side of the Dodge?

A. No, I said it could have been a little bit more to the left than it was in the middle.

Q. Yes, that's right. A little bit to the left of the middle?  
A. That's right.

Q. Did you observe now, you were not interested in this case, were you?  
A. No.

Q. You are not now, are you?  
A. No.

Q. Did you have any occasion to observe

(Testimony of Justin L. McNeil.)

whether or not these cars were directly in line behind each other?

A. Well, I would say that they were.

Q. Did you take any pains, did you make any examination to see whether they were, or not, or is that just your best recollection?

A. Well, both of them were in a line of traffic—neither one was over the white line.

Q. Neither one was over the white lines. You mean this line here (indicating)?

A. That's right.

Q. As near as you recall—in other words, all you observed, then, as I understand it, is that the two cars were in the line between the safety zone and the line of the traffic [76] lane, the traveling lane?

A. They were what I would say, one was right directly behind the other, within a matter of maybe six or seven inches.

Mr. Scholz: That is all.

Mr. Bucher: That is all, Mr. McNeil.

Mr. Bucher: Mrs. Diamond Fotopulos.

MRS. DIAMOND FOTOPULOS,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Q. Your name is Mrs. Diamond Fotopulos? A. Fotopulos.

Direct Examination

Mr. Bucher: Q. Mrs. Fotopulos, may I caution you to speak loud enough to the Court, so that the



(Testimony of Mrs. Diamond Fotopulos.)

Court and counsel and the court reporter may hear your testimony as well as counsel?      A. Yes.

Q. You are the widow of Peter Fotopulos, the deceased?      A. Yes.

Q. Mrs. Fotopulos, several things have been stipulated to by counsel which will relieve my questioning you upon them. I will direct my examination to the day of the accident and the days following. Do you recollect the accident that your husband was involved in on the 23rd of December, last?      A. Yes, I do.

Q. Were you at home during that day? [77]

A. I was.

Q. Did your husband leave early in the morning as usual?      A. Yes, he did.

Q. In the Dodge truck?      A. Yes.

Q. When did he return, what part of the day?

A. It was a little after noon, about close to one o'clock.

Q. And what happened when he came home?

A. Well, he was—

Q. Did he tell you about the accident?

A. Yes, he did.

Q. What happened?

A. Well, he was all shaken, white, and I asked him, "What's wrong?" I asked him if he was hurt, and he said he was. He said, "Yes I was in an accident, I was hit from the rear by a truck, and I hurt my stomach." So he sat down, tried to—

Mr. Scholz: If your Honor please, I think that will be objectionable, what "I was told."

(Testimony of Mrs. Diamond Fotopulos.)

Mr. Bucher: I concede. I will try to avoid that as much as possible. You can only state what you observed, and not what happened, not anything that he told you, Mrs. Fotopulos.

Q. Now, did he remain home the rest of the day? A. Yes, he did.

Q. Did he go to bed earlier than usual? [78]

A. He did, right away.

Q. When? A. Just as soon as he—

Q. Did he eat dinner that evening?

A. What is it?

Q. Did he eat dinner that evening?

A. Oh, no, he couldn't eat.

Q. Now, the next day was the 24th of December, the day before Christmas. Did he go to his place of business that day? A. Yes, he did.

Q. What time of the day?

A. Oh, it must have been about ten o'clock, about ten.

Q. Did he remain there long before he came home?

A. No, just a few hours and he came home again.

Q. He came home about what time of the day?

A. Oh, it must have been a little after noon, about 1:00.

Q. Did he eat solid food during these days?

A. No, he didn't.

Q. What did he eat?

A. Just broth or soft-boiled eggs. I would make him a custard or jello—very light food.

(Testimony of Mrs. Diamond Fotopulos.)

Q. Now, Mrs. Fotopulos, following Christmas day, until the early part of January, did he go to his place of business every day?

A. Yes, he did, except just for a week. [79]

Q. For about a week. When, following the 23rd of December?

A. Yes.

Q. And then what did he do after that?

A. Well, he kept getting worse every day, complaining of his stomach, pain in his stomach, so I pleaded with him to go and see a doctor, but he didn't believe in going to doctors, he said, "I'll be all right."

Q. Never mind what he said, but, well, did he finally go to a doctor?

A. Yes, he did. He went to a Doctor Wertheim.

Q. That was on the 3rd of January?

A. Yes.

Q. Now, New Years was on the 1st day of January, of course, and do you remember whether he worked on the 2nd of January?

A. No, he couldn't work then.

Q. Did he go to his place of business at any time after the 1st day of January?

A. He just, I don't believe he did. I don't remember exactly, but I don't believe he did after that. He just was he just couldn't stand up any more. He was getting worse every day.

Q. Well, he was up and around on the 3rd of January, was he, when he went to the doctor's office?

A. Yes.

Q. And did he come home directly from the doctor's office?

A. Yes, he did. [80]

(Testimony of Mrs. Diamond Fotopulos.)

Q. Did he go to bed early that day?

A. Yes, he did.

Q. Do you know what time?

A. Oh, right as soon as he came home from the doctor's. Went right to bed.

Q. Was that in the afternoon? A. Yes.

Q. And then do you know what happened on the 4th of January, the day he went to Dr. Wertheim? Did he get up again?

A. Yes, he did get up, but he felt worse, and I pleaded with him to go and see a doctor or a specialist, someone that would know better than Dr. Wertheim. He said, "All right, I'll be all right, Dr. Wertheim said it was nothing."

Q. But he didn't go back to his place of business at any time after that?

A. No, it kept getting worse, he complained, crying all night and in pain, and finally on the 6th, I think it was the 6th of January, we were up all night. The children and I. We couldn't do anything for him. We tried our best to comfort him, and it just seemed impossible toward the early hours of the morning. I called up Dr. Ryan. I couldn't stand seeing him suffer like that. So Dr. Ryan wasn't there. They got in touch with Dr. Musser. I told him the symptoms, and I told him about his pains, and that it kept getting worse, so he said, "Bring him to the hospital right away so I can look him over." [81]

Q. Then you took him to the hospital?

A. Yes.

(Testimony of Mrs. Diamond Fotopulos.)

Q. Now, Mrs. Fotopulos, while your husband was alive he was owner of what is known as the P. F. Casing Company, was he? A. Yes.

Q. That was a one-man company, was it not?

A. Yes.

Q. Owned and operated by himself?

A. Yes.

Q. That was in the treatment and sale of casings for meat—sausages, wasn't that it, isn't that right? A. Yes.

Q. And since then, has that business ceased to operate?

A. Yes. I tried to work the business, but I couldn't make a go of it. I kept losing money every day, I finally had to close it down.

Q. You got nothing for it?

A. No, I have nothing for it.

Mr. Bucher: You may take the witness, Counsel.

### Cross Examination

Mr. Scholz: Q. Mrs. Fotopulos, Mr. Fotopulos had two accidents and sickness policies with Occidental Life Insurance Company?

Mr. Bucher: I object to that, if the Court please. I can't see any relevancy between that question and this case, as to whether he had any sickness or accident policies. [82]

The Court: Sustained.

Mr. Scholz: Q. Your brother's name is John J-a-h-m-a-k-e-s? A. Yes.

(Testimony of Mrs. Diamond Fotopulos.)

Q. And isn't he the manager of the P. F. Casing Company?

A. Yes, he helps me work it.

Q. And he took over the management of the business, did he not?

A. We both did, together.

Q. And he is now managing the business?

A. No.

Q. Who is now managing the business?

A. I lost the business completely. I couldn't make a go of it.

Q. Now, didn't Mr. Fotopulos go down to the place of business, up to the time he went to the St. Francis Hospital?

A. Yes, the first week he did.

Q. In other words—

A. Just a few hours a day.

Q. In other words, he went to the hospital on January the 7th, did he not?      A. Yes.

Q. And he went down to the business up to that date, did he not?

A. No, not up to that date.

Mr. Scholz: That is all.

Mr. Bucher: That is all, Mrs. Fotopulos. [83]

The Court: You may step down.

(Witness excused.)

Mr. Bucher: May it please the Court, I desire to introduce in evidence a certified copy of the death certificate.

Mr. Scholz: Well I haven't seen it.

Mr. Bucher: Well, it is a public record.

Mr. Scholz: But I don't know whether that—I think that is purely hearsay.

Mr. Bucher: That is certified as a public record.

Mr. Scholz: I know, but it is still hearsay.

Mr. Bucher: Well, can it be introduced for what it is worth?

Mr. Scholz: Of course, that is up to Court; but I still think it is hearsay.

The Court: What is the purpose of this showing? There is no question about the fact of death, is there?

Mr. Bucher: No question about the fact of death, but this shows the cause of death as indicated by the autopsy surgeon.

I will not press the issue, if the Court please because the evidence is already in. However, I desire to introduce a certified copy of the verdict of the Coroner's Jury, which clearly is admissible as being again a public document.

Mr. Scholz: I object to that upon the ground it is incompetent, irrelevant, and immaterial, and not binding upon the [84] United States, or any of the defendants.

Mr. Bucher: Testimony before the Coroner, or a transcript of testimony, is not proper evidence, but it has been held that the verdict of the jury is competent.

Mr. Scholz: I don't know how it could be when the parties are not present to testify, or without notice, I don't see how it would be binding on any of the defendants, or on anyone.

The Court: Objection sustained.

Mr. Bucher: At this time we rest.

(Plaintiff rests.)

The Court: You might have that document marked for identification.

Mr. Bucher: Yes.

The Court: Those several documents may be marked for identification.

Mr. Bucher: Yes, if I may, with the Court's permission.

The Court: They will be marked, just for the purpose of your record.

The Clerk: Death Certificate is marked Plaintiff's 1 For Identification; verdict of Coroner's Jury is marked Plaintiff's 2 For Identification.

(Death certificate was marked Plaintiff's Exhibit I For Identification; verdict of Coroner's Jury was marked Plaintiff's Exhibit 2 for Identification.)

The Court: There is also one other phase that I think [85] should be made a matter of record. The doctors were examined with respect to reports upon which they based their opinions in the light of the facts of the medical questions submitted to them. I suggest to counsel that you mark the several documents for identification in the record so it will be a matter of official record, merely for identification.

Mr. Scholz: That is true.

The Court: That can be done at the conclusion. I merely thought about it at this juncture. There is no special hurry.



MATHEW J. LIGHTBODY,

called as a witness on behalf of the United States;  
sworn.

The Clerk: Q. Will you please state your name  
to the Court, please?

A. Mathew Lightbody.

Direct Examination

Mr. Scholz: Q. Mr. Lightbody, what is your  
occupation?

A. I am a special agent of the FBI.

Q. And how long have you been in such capac-  
ity, such agent? A. Seven years.

Q. And you still are at the present time?

A. Yes.

Q. Now, at the request of the United States  
Attorney's office, did you interview any witnesses  
in regard to the present action pending in this  
Court, the case of Fotopulos vs. United States  
[86] of America? A. I did.

Q. And was there, among those witnesses, a  
man by the name of Harry Failor?

A. I did.

Q. And at the time that you interviewed him  
did you identify yourself as a Federal Bureau of  
Investigation agent? A. I did.

Q. And you told him the purpose of it?

A. Yes.

Q. Did he say to you at that time— By the  
way, what was that date?

A. I have some notes here that I think will

(Testimony of Mathew J. Lightbody.)

help. I can give you the dates from those (consulting notes). July 7, this year.

Q. July 7 of 1947? A. Yes.

Q. And where?

A. At their place of business, 1350 Van Ness Avenue.

Q. At that time did he state, in response to a question, that he could not recall whether there were any other trucks, any other cars, in the curb lane at the time of the accident?

A. Yes, he told me that he couldn't remember seeing any other cars in the curb lane.

Q. What else did he state to you at that time?

A. Well— [87]

Mr. Bucher: If the Court please—

Mr. Scholz: Well, withdraw that question. I think it is too—

Q. Did he also state to you that he had no recollection of seeing any other truck in front of the Dodge pick-up? A. That's right.

Q. And did you ask him the question if he knew anything more about the case than what he had already told you? A. Yes.

Q. And did he volunteer any information to you that the driver of the two vehicles, the drivers of the two vehicles, were arguing about the case, and that the Army vehicle driver stated that his brakes would not work?

A. He made no such statement to me.

Q. Now in the course of this investigation, did you also talk to a witness by the name of Justin McNeil? A. I did.

(Testimony of Mathew J. Lightbody.)

Q. And did he state to you that he had some recollection that there was another truck in front of the pick-up of the deceased?

A. Yes, he did make such a statement.

Q. Did he also make a statement that he was not sure, but that he believed there was a car in the curb lane?

Mr. Bucher: If the Court—

A. Yes.

Mr. Bucher: Wait a minute, I object to this line of questioning. [88] It is not proper examination for impeachment purposes, it is leading, directive.

The Court: Overruled.

Mr. Scholz: Q. Did he state that the pick-up was either very near the pedestrian crosswalk or partially into this crosswalk? A. Yes.

Mr. Scholz: That is all.

#### Cross Examination

Mr. Bucher: Q. Mr. Lightbody, did either Mr. Failor or Mr. McNeil tell you the relative positions of the two automobiles at the time they came to rest on the day of the accident?

A. Well, as I recall, they did state that they were together in the rear, that is—

Q. And they also stated to you that they were in direct line, one with the other, one behind the other, didn't they?

A. No, I don't recall that they did.

Q. Well, did you ask them about that?

A. I don't remember specifically.

(Testimony of Mathew J. Lightbody.)

Q. You don't remember whether you asked them the position of the cars, or not, do you?

A. I asked them what the position of the pick-up truck was, yes.

Q. And didn't they tell you that the pick-up truck was partially in the pedestrian lane facing north—isn't that what they [89] told you?

A. Yes.

Mr. Bucher: That's all.

Mr. Scholz: That's all.

The Court: You may be excused.

Mr. Scholz: Captain Jenkins.

**TERRY O. JENKINS,**

called as a witness on behalf of the United States;  
sworn.

The Clerk: Q. Will you state your name to the Court, please?      A. Terry O. Jenkins.

**Direct Examination**

Mr. Scholz: Q. Captain, what is your occupation?

A. I am the maintenance officer at the Presidio, sir.

Q. And how long have you been maintenance officer at the Presidio?

A. For a year and a half, sir.

Q. Have you gone through the prescribed schools of maintenance, prescribed by the Army?

A. I have, yes, sir.

Q. And what year did you take that?

A. 1940, sir.

(Testimony of Terry O. Jenkins.)

Q. And ever since that date, you have been associated with the Department of Transportation, maintenance of transportation, for [90] the Army?

A. Yes, sir.

Q. And are you familiar with the Army vehicle involved in this accident?

A. Yes, sir, I am.

Q. And immediately after the accident was a report submitted to you by the driver?

A. It was, yes, sir.

Q. And did you examine the vehicle, the Army vehicle?

A. Yes, sir.

Q. Did you find any damage to the Army vehicle?

A. The paint had been scraped off on the right side of the front bumper.

Q. The right side of the front bumper?

A. Yes, sir.

Q. Did you find any other damage to the Army vehicle?

A. None, whatever, sir.

Q. Did you notice—referring to the front part of the Army vehicle, was there any mud on that vehicle?

A. There was, yes, sir.

Q. It had not been knocked off by the previous accident?

A. No, sir, it had not.

Q. Still there?

A. Still there, yes, sir.

Mr. Scholz: May I have the exhibit referring to damage [91] to the Dodge car? I don't recall what number.

The Clerk: There is no exhibit such as that.

Mr. Scholz: Didn't you offer that in evidence?

Mr. Bucher: I didn't. I neglected to, but here it is. (Presenting document to counsel.)

(Testimony of Terry O. Jenkins.)

Mr. Scholz: If you are going to offer this any way—

Mr. Bucher: Yes, it has to be offered. It can be marked for identification now.

Mr. Scholz: Well, this is not the one that he offered, is it? I thought he referred to one, the original one, and this one he couldn't quite identify.

Mr. Bucher: **He identified it, except he said** there was one minor item, he said there was a little variance. Otherwise, it is a copy of the original. I'll say this, Mr. Scholz, that was furnished me by the J. E. French Company.

Mr. Scholz: Well, if you are going to offer it in evidence I think you should at this time.

Mr. Bucher: You can examine him on it; I don't care.

Mr. Scholz: Q. Did you examine the Dodge pick-up? A. I did, yes, sir.

Q. Did you find any evidence—assuming there was a collision on December 23, 1946 wherein the Dodge pick-up was hit by the Army vehicle—did you find any evidence of any damage by that collision to the Dodge vehicle?

A. I did not, no, sir.

Q. Did you find any damage to the tail gate or tail light, or [92] whatever it might be?

A. The tail gate of that vehicle is missing at the present time, it is not on the vehicle.

Mr. Bucher: Well, I ask that that answer be stricken as not responsive to the question.

The Court: It may go out. When, Mr. Scholz,

(Testimony of Terry O. Jenkins.)

did the captain make the examination which he testified to, in point of time?

Mr. Scholz: Q. Can you answer that question?

A. It was either the day before Thanksgiving or the day after.

Mr. Bucher: Of this year?

The Witness: Of this year.

The Court: That is why I asked the question.

Mr. Bucher: Yes, I thought it was immediately after the accident. It is rather incredible that there was no damage to the Dodge car, in the light of the testimony that has thus far been elicited.

Mr. Scholz: I think so, too.

Q. Did you examine the height of bumper, the figures on how the Army car would strike, if it did strike the Dodge car?

A. Yes, I did. I made a drawing of the vehicle.

Q. What did you find?

A. The bottom of the Army bumper was 25 inches from the ground.

Q. Go ahead.

A. The bumper is eight inches wide. The bumper is made of [93] metal 7/32 of an inch thick.

Q. From your examination of the Dodge car and the Army vehicle, where would it have been possible for the Army vehicle to strike the Dodge car?

Mr. Bucher: I object to that, if the Court please.

The Court: Sustained. He may testify as to his physical examination; that is, the examination

(Testimony of Terry O. Jenkins.)

of the physical properties immediately after the accident. You may direct his attention to that.

Mr. Scholz: I don't think he examined it immediately after the accident.

The Court: He examined the Army car.

Mr. Scholz: Yes.

The Court: You examined the Army car?

The Witness: Yes, sir.

The Court: Q. Within the hour after the accident? A. Yes.

Mr. Scholz: I think he has already testified as to the physical damage on that, your Honor. I don't think—

Q. Did' you examine the brakes of the Army vehicle immediately after the accident?

Mr. Bucher: Wait a minute, object to that, if the Court please, on the ground that the condition of the brakes immediately, or as he said, within the hour after the accident, the accident having intervened in the meantime, is improper [94] direct examination.

The Court: Where is the driver of the car? Is he available?

Mr. Scholz: The driver of the car, they have taken his deposition, and the man who rode with the driver, I have the statement of the doctor. He won't be able to be here. But he will be available very shortly.

Mr. Bucher: Well, the deposition has been taken.

The Court: Where is the driver now?



(Testimony of Terry O. Jenkins.)

Mr. Scholz: In Massachusetts.

The Court: Is he in the United States Army?

Mr. Scholz: He has been discharged and he is in Shelburne Falls, Massachusetts. However, the deposition was taken, and I think your Honor has on file here the deposition of the driver. However, I think that will be admissible, if your Honor please, for this reason—

The Court: I will allow the question.

Mr. Scholz: Would you please repeat the question?

(Record read.)

A. Within an hour after the accident.

Q. And what was the condition that you found the brakes of the Army vehicle?

A. They were in excellent shape.

Mr. Scholz: That's all, I guess. [95]

#### Cross Examination

Mr. Bucher: Q. Captain, where were you on the morning of the 23rd of December?

A. I was at the post motor pool at the Presidio.

Q. And what was the first notice you had of this accident?

A. The driver of the vehicle brought a driver's accident report to me.

Mr. Bucher: Mr. Scholz—

Mr. Scholz: I have it.

Mr. Bucher: No, I am not asking you for that, but at the time the deposition of Mr. Hammond

(Testimony of Terry O. Jenkins.)

was taken, there were certain photographs introduced by you in evidence. I assume, if the Court please, that those are attached to the deposition. That is, the deposition of Roy Lee Hammond.

The Clerk: There are certain photographs in here.

Mr. Bucher: May I see that?

(Handed to counsel by the clerk.)

Mr. Bucher: That is all, if the Court please.

The Court: All right.

Mr. Scholz: Mr. Gaber.

JOHN FRANK GABER,

called for the United States; sworn.

The Clerk: Q. Will you state your name to the Court, please? [96] A. John Frank Gaber.

The Court: Before this witness is interrogated, is there any stipulation in the record thus far to the weight of the Army truck?

Mr. Bucher: No, your Honor.

Mr. Scholz: No, your Honor.

The Court: I think we should have a general description of the Army truck and the weight of it while the captain is in court.

Mr. Bucher: The captain should be recalled for that.

The Court: Do you know, Mr. Scholz? What is it? It is a ton or two tons?

Mr. Scholz: It is a 6x6, a Chevrolet 6x6, we call it.

The Court: It is a Chevrolet?

(Testimony of John Frank Gaber.)

Mr. Scholz: Yes. I might have it here.

The Court: Is it what we commonly refer to as a pick-up truck?

Mr. Scholz: I would rather ask the captain. What kind of a truck is that?

Captain Jenkins: That is a ton and a half stake-box, sir.

The Court: All right. Proceed.

Direct Examination

Mr. Scholz: Q. Mr. Gaber, in December of 1946 you were employed by the Atlas Towing Company of San Francisco as a driver? [97]

A. Yes, sir.

Q. And you went to Bush and Van Ness Avenue about 10:00 o'clock on December 23?

A. Yes, sir.

Q. And while there you saw a Dodge pick-up truck and an Army vehicle? A. Yes, sir.

Q. Now, will you indicate, disregarding anything you see on here, will you indicate where you saw the Dodge pick-up truck, when you first saw it, about 10:00 o'clock on the morning of December 23, 1946?

Mr. Bucher: Pardon me, Mr. Scholz. If the Court please, what time of day was this?

Mr. Scholz: About 10:00 o'clock.

The Witness: About 10:00 o'clock in the morning.

Mr. Bucher: Very well, thank you.

Mr. Scholz: Q. Now, this is scale drawn. Do you know what I mean by "scale"?

A. Yes, sir.

(Testimony of John Frank Gaber.)

Q. So this is about 11 feet here, and I presume the way we have got one of these little things—

Mr. Bucher: Cars, you mean.

Mr. Scholz: Yes. Well, that is all right.

Q. Well, this one here is eight feet to an inch. Here is one which says eight feet. So, put it in position more or less, as [98] near as you can.

A. Near where the truck was?

Q. Yes, where you saw the Dodge truck.

A. When I picked it up, the Dodge pick-up was lying right about in this position (indicating), and the Army vehicle was lying right in here when I picked them up.

Q. Now, will you indicate this one here?

A. That is the Dodge.

Q. That is defendant's No. 7. That indicates the position of the Dodge pick-up when you saw it?

A. Yes, sir.

Q. And that will be defendant's No. 8. It indicates the position of the Army vehicle when you saw it.

A. Yes, sir.

Q. Now, as I understand, then, the Dodge pick-up was just about the line, just short of it, a little bit over the line of the crosswalk?

A. Of the intersection, yes, the crosswalk.

Q. And the Army vehicle was behind it, but to the left of it?

A. Yes, it was in the center.

Q. That would have to be to the west of it?

A. Yes.

Q. Do you recall whether or not that Dodge

(Testimony of John Frank Gaber.)

pick-up was straight? I mean, assuming this is north and this is south, was that Dodge straight, or was it pointing slightly to the east or west? [99]

A. Well, when I picked it up, well, maybe just a couple of degrees to the west.

Q. A couple of degrees? A. Yes.

Q. A little bit to the west, is that right?

A. Yes, sir. Not very much, just slightly.

Q. Slightly? A. Yes, sir.

Q. And the Dodge, or the Army vehicle—

A. Was straight behind it, straight on up, in that line there (indicating).

Q. Straight north and south? A. Yes, sir.

Q. The driver of the Dodge pick-up was there, was he not, when you got there?

A. Yes, he was.

Q. And was there any appearance of any injury or anything to him that you could see, that you saw?

A. No, there wasn't. He didn't say anything. He walked around the truck while I hooked onto it and claimed into the cab of my truck and we went down to J. E. French, I drove in, he got out of the truck and walked around again and looked inside of this truck. Then he walked over to the front of my truck when I dropped his truck down, then he went back again, I guess. Dupont was there and they were talking about the truck in [100] back of mine.

Mr. Scholz: That is all.

(Testimony of John Frank Gaber.)

Cross Examination

Mr. Bucher: Q. Mr. Gaber, who have you talked with about this case since then?

A. Pardon?

Q. Who have you talked with about this case since then?

A. I haven't talked to anybody about it.

Q. Not a soul? A. Not a soul.

Q. Well, did you talk to any representative of the FBI? A. I talked to Mr. Lightbody.

Q. Well, then, did you talk to somebody—

A. (Interposing): But I haven't talked to anybody else. I mean, he came down to the garage and asked me some questions.

Q. When was that? When did he come to the garage?

A. I don't remember. It was back in—it must have been July or June or somewhere around there.

Q. June or July; that is the first time you talked with anybody about the accident, was it?

A. Yes.

Q. And did he tell you about what the position of those trucks was before you described it to him?

A. No, I told him what the position of them were.

Q. And you remembered very distinctly after six months just [101] what the position of those trucks were?

A. Yes, I do. I picked them up. I went on call and picked up the Dodge pick-up, and I remember

(Testimony of John Frank Gaber.)

exactly where it was, because I went around on the righthand side of it, then up to the front of it and backed up to the truck.

Q. Well, you are in the business of towing cars, aren't you?      A. Yes, sir.

Q. You tow, I suppose, in the neighborhood of two or three cars a day?      A. Ten or fifteen.

Q. Ten or fifteen a day?      A. Yes.

Q. Week in and week out?

A. That's right.

Q. And do you remember the position of every car in every towing job that you do?

A. No, I don't, but that one there specifically I do.

Q. Why do you remember this one in particular any more than any other one?

A. On account of the Army truck was involved in it and I happen to remember the exact accident, exactly where they were.

Q. Because the Army truck was involved, that created a more distinct recollection in your memory, did it?

A. Yes, I remembered it a lot easier.

Q. What? [102]

A. It came to me a lot easier. I remembered it easier. I have a lot of wrecks.

Q. Now, isn't it true, Mr. Gaber, that you don't remember exactly the position of those cars?

A. Now—

Q. No, wait a minute. Isn't it true that you don't remember the exact position of those cars

(Testimony of John Frank Gaber.)

any more than you remember the position of other cars in other accidents, and that they might have been in a line, one right behind the other?

A. No.

Q. You insist on that?

A. That is where that truck was when I picked it up.

Q. You are positive of that?

A. Yes. It might have been straight when the accident happened and then again, somebody might have pushed it to where it was, but that is where I picked the truck up, half in one lane and half in the other lane.

Q. Now, you think that is about an hour after it happened?

A. It was about 10:00 o'clock, I guess.

Q. Around 10:00 o'clock.

A. Yes. It must have been about twenty minutes to a half hour after the accident.

Q. Well, they told you when the accident had occurred, did they?

A. No, that is what I figure. [103]

Q. You just guessed about that?

A. I figured that, because they have to call up to French and then French calls down to Atlas; I was down on a job, and called in and they gave me the job. Then we went in there and picked it up.

Q. You were on another job at the time?

A. Yes, and I called in to the office and they received a call from French. I believe they received



(Testimony of John Frank Gaber.)

a call from them to come out and pick up the truck and bring it to French's.

Q. Yes. And you don't know where the Dodge truck was in the pedestrian lane?

A. It was a little bit into it.

Q. It was a little bit over in the pedestrian lane?

A. Yes.

Q. But you are positive, are you, that it centered on the east side of the white line, is that right?

A. That's right.

Q. You are positive of that?

A. That is where I picked it up.

Q. In other words, you are sure that it wasn't over, headed over into the safety zone in that position (indicating)?

A. No.

Q. You are positive of that, aren't you?

A. Yes.

Mr. Bucher: That is all. [104]

Mr. Scholz: That is all, Mr. Gaber.

The Court: You may be excused.

Mr. Scholz: Now, if your Honor please, we have the deposition of Mr. Bailey, who was in the Army truck as the driver. Charles Arthur Bailey. He is now out of the Army, and his deposition was taken in Massachusetts, in Boston. We also have a witness by the name of Corporal Roy Lee Hammond. I have here the certificate from Letterman General Hospital that Corporal Roy L. Hammond is at this time a bed patient, and that he will be unable to appear in Court on Thursday, December 4, 1947.

“It is my opinion, unless unforeseen conditions arise, that Corporal Hammond will be able to appear in court at any time after the eighth day of December, 1947. (Signed) William J. Fleming, Captain, Medical Corps.”

We also have this deposition, because at the time I took his deposition, I was informed that he would be discharged from the Army, so in order to get his testimony, we took his deposition. I believe it would be better to have the witness here in person to testify, rather than merely reading the cold record.

The Court: Is the corporal's illness a serious one?

Mr. Scholz: No, he was here in court once before, but it was continued. At that time he complained that he wasn't feeling very well. As a matter of fact, while he was going to be discharged, he was held up because he was going through Letterman General Hospital. However, the doctor here testified [105] that unless that unforeseen conditions arise, he will be able to appear in court at any time after the eighth day of December, 1947. Whatever the Court wants to do on that, we have no objection.

Mr. Bucher: If the Court please, may I interrupt? This question of the deposition of Hammond, may I suggest that as counsel states, the deposition was taken with the idea that he was to be out of the Army before this case could be tried. However, the deposition was taken, it is in the regular form, sworn to. May I suggest to the Court—I am sure

the Court is familiar with the fact that the Rules of Civil Procedure of the Federal Court provide that the deposition of a witness, whether or not a party, may be used by any party for any purpose, if the Court finds the witness is unable to attend to testify because of age, sickness, infirmity, or imprisonment. I submit that the deposition could properly be read.

Mr. Scholz: Well, I think it is true, your Honor, but as counsel just said, he is not available at the moment, but, if the Court please, that is only temporary because of illness. But as I pointed out to the Court before this case came to trial, we had received information that he would not be available at the time of trial, but would probably be available shortly thereafter. Whatever the Court desires would be agreeable, but it would seem to me that perhaps the Court would prefer to have the witness testify in person rather than take the [106] cold record.

Mr. Bucher: Well, the deposition is very complete. It goes into all the facts.

Mr. Scholz: Yes, but the demeanor of the witness is not in the record, unfortunately. Well, we have the deposition of the driver, we can proceed on that.

Mr. Bucher: Yes, your Honor.

The Court: Let us take this up after a short recess.

Mr. Bucher: Very well.

(Short recess.)

Mr. Scholz: May I proceed with the reading of the deposition, your Honor?

(Deposition of C. A. Bailey.)

The Court: Yes, Mr. Scholz.

Mr. Scholz: Have we the original, or shall I read from the copy?

The Court: Do you desire the original?

Mr. Scholz: If your Honor please, I think this is an exact copy. (Reading)

“Be It Remembered that on Wednesday, November 12, 1947, pursuant to written stipulation of counsel in the office of the United States Attorney in the United States Court House and Postoffice Building in the City of Boston, County of Suffolk, of Massachusetts, personally appeared before me, Edward J. Grace, 11 Pemberton Square, Boston, a Notary Public in and for the Commonwealth of Massachusetts, [107] Charles Arthur Bailey, a witness called on behalf of the defendant. S. Lang Makrauer appeared as counsel on behalf of the plaintiffs. Gerald J. McCarthy, Esq., Assistant United States Attorney, appeared as counsel for the defendant.”

Mr. Bucher: We will waive the reading of the stipulations following that.

The Court: The stipulations are in the usual form?

Mr. Bucher: Yes, your Honor.

The Court: So ordered.

Mr. Scholz: Then we will go to the direct examination.

“Q. (By Mr. McCarthy): What is your full name?            “A. Charles Arthur Bailey.

“Q. Where do you live, Mr. Bailey?

(Deposition of C. A. Bailey.)

“A. Shelburne Falls, Mass. R. F. D. That is the mail address. The residential address is Martin Road, Buckland, Massachusetts.

“Q. What is your occupation, Mr. Bailey?

“A. At present I am a molder in the Prophylactic Brush Company, Florence Massachusetts.

“Q. Were you in the armed forces of the United States? “A. Yes, sir.

“Q. In the armed forces of the United States on the 23rd day of December, 1946?

“A. Yes. [108]

“Q. Where were you stationed at that time?

“A. The Presidio at San Francisco.

“Q. Calling your attention to the 23rd day of December, 1946 were you driving an armored vehicle going north on Van Ness Avenue, San Francisco?

“A. I am not acquainted with the direction, I believe it was north.

“Q. I will show you this—”

Mr. Scholz: I have “chalk”.

Mr. Bucher: It should be “chart”.

The Court: May I change the deposition by stipulation of the parties to the word “chart”?

Mr. Bucher: Yes, your Honor, that occurred several places.

The Court: It is indicated now that it is changed to “chart”.

Mr. Scholz: I think your Honor will find probably several other places.

The Court: Well, then, a uniform change may be made throughout by stipulation?

(Deposition of C. A. Bailey.)

Mr. Bucher: Yes, if your Honor please.

Mr. Scholz: Yes, your Honor.

(Reading): "Q. I show you this chart marked Plaintiff's Exhibit 3. This diagonal here shows you the direction. "A. That is right.

"Q. In other words, from where you are sitting to your [109] right is north?

"A. That is right.

"Q. To your left is south? "A. Yes, sir.

"Q. Facing me across the desk is west? And back of you would be the east?

"A. That is right.

"Q. Now, having looked at the chart were you driving an Army vehicle in a northerly direction on Van Ness Avenue in San Francisco on December 23, 1946? "A. Yes, sir.

"Q. At what time of day?

"A. Approximately 11 o'clock, I am not sure.

"Q. You are sure it was not earlier than that?

"A. No, I would not say either way. I do not remember the hour of the day, in fact to be truthful until it was brought to my attention I did not know the exact date. I would not have remembered it.

"Q. Would it refresh your memory if I told you it was 9 o'clock in the morning?

"A. No, it could just as well be 9 o'clock. I would not say. I do not have any idea of the time now.

"Mr. McCarthy: I suppose we can stipulate that Van Ness Avenue runs north?

"Mr. Makrauer: I think so, from this plan, Mr. McCarthy. [110]

(Deposition of C. A. Bailey.)

“Mr. McCarthy: And Bush Street—

“Mr. Makrauer: Due East and West, yes.

It would appear so from the chart.

“Q. Refer to the chart and notice where Bush Street is. “A. Yes.

“Q. Take it over close to you. (Witness examines paper.) Are there two sets of car rails on Van Ness Avenue? “A. Yes, sir.

“Q. Do you recall as you approached Bush Street as to whether or not there was a safety zone there? “A. Yes, sir, there was.

“Q. As you approached Bush Street, did anything happen? “A. Yes, plenty.

“Q. Will you state what happened, please?

“A. Well, I hit the back of another vehicle. Now I cannot give a definite description of it. It has been quite awhile since then.

“Q. Do you recall whether or not it was a 1936 Dodge pick-up?

“A. A 1939, I thought it was. I might be mistaken on the year of the vehicle.

“Q. Will you state more in detail, Mr. Bailey, please, how this accident happened?

“A. Well, this other vehicle driven by Peter Fotopulos, I take it, was being driven on the extreme right-hand lane. [111] I was driving in the left of the center lane nearest the cartracks, which is this lane here (indicating). There is also a third lane over the cartracks.

“There was another truck in front of me. As far as the description, I could not tell you, I did not

(Deposition of C. A. Bailey.)

pay much attention to it. This pickup truck driven by Fotopulos cut from the right lane into the lane in front of me. There was no way for me to stop in time. I turned out to avoid hitting him.

“Q. Are there lanes on each side of the car tracks on Van Ness Avenue?

“A. Yes, two lanes on each side of the car tracks. Each car track has a lot of travel.

“Q. As the Army vehicle you were driving approached Bush Street on Van Ness Avenue, what lane were you traveling on?

“A. In the center lane on Van Ness Avenue, which would be this lane here. There are three lanes each way.

“Mr. Makrauer: These are the car tracks.

“The Witness: Yes, but it is a lane of traffic also. A lane of traffic in here right over the car tracks. The car tracks come together. There is a safety zone here and also here at each intersection (indicating). Then there is a lane of traffic on this side of the car tracks, on this side, and then over here. [112]

“Q. Which lane were you in?

“A. In the center, right here.

“Q. Will you indicate?

“Mr. McCarthy: Do you mind if he marks it?

“Mr. Makrauer: No.

“The Witness: Right here (marking the paper). One, two, three lanes.

“Q. This mark?

“Mr. Makrauer: Just a minute, Mr. McCarthy,



(Deposition of C. A. Bailey.)

before marking it, what are you going to have him do?

“Mr. McCarthy: Place his car there.

“Mr. Makrauer: O.K., all right.

“Q. Will you make a mark or draw a box indicating where you were driving at the time?

“A. That was about my position at the time.

“Q. Would you mark that A, please? That represents the Army truck you were driving?

“A. Yes, sir.

“Q. Will you indicate on that chart marked Plaintiff's Exhibit 3 where the truck that you later collided with was being operated?

“A. Right here, coming in front, in this zone here. It came in on the right of me, his vehicle.

“Q. Does this red line indicate a curb?

“A. That is the white line between the lanes, I take it. [113]

“Q. Put your mark on that, B, indicating the car you saw subsequently.

“Mr. Makrauer: Rub this out, where he started, so he will not get it all messed up.

“Q. Do you know where Sutter Street is?

“A. Yes, sir.

“Q. Sutter Street crosses, it is the cross street that runs parallel to Bush Street?

“A. Yes, sir.

“Q. And is south of Bush Street?

“A. Yes, sir.

“Q. Do you know whether or not there are stop lights at Sutter Street? “A. There are.

(Deposition of C. A. Bailey.)

“Q. Do you know whether or not you had made a stop at Sutter Street?

“A. No, I do not remember.

“Q. Well, now, do you know what the distance is approximately between Sutter Street and Bush Street?

“A. No, I do not. I do not have much idea. I am not very good at guessing distance. San Francisco is a long block, I know that.

“Q. As you travel between Sutter Street and Bush Street, what speed was your vehicle which you were driving being operated at? [114]

“A. Not over 15 or 18 miles an hour. I doubt if it was that fast.

“Q. As you approached Bush Street, what was the condition of the stop sign?

“A. I did not notice the stop sign. I did not get that far before this other vehicle cut in front of me. At that time all I thought of was stopping, anyway.

“Q. Did you apply your brakes immediately?

“A. Yes, sir, at once.

“Q. What distance did your car travel from the time you first applied your brakes until you collided with the vehicle that cut in from your right?

“A. A very short distance. I would not say exactly.

“Q. Give us your best judgment as to how far you went from the time you applied your brakes until the two vehicles collided with each other.

(Deposition of C. A. Bailey.)

“A. Not over twenty feet.

“Q. At the time you applied your brakes, Mr. Bailey, what was the speed of your car, the car you were driving?

“A. I cannot say exactly, 15 miles, probably.

“Q. Did the operator of the vehicle that you collided with, that came in from your right lane give you any signal of any kind?

“A. No signal whatsoever. He cut in before he was past me, so I could not have seen the signal if he did. [115]

“Mr. Makrauer: Will you repeat that answer?

“The Witness: He was right at the side of me when he cut in. He was not ahead. I could not have seen the signal if he had given it. He was at the side. He just missed cutting into the line.

“Q. You previously testified there was another truck ahead of you. In what lane was he operating?

“A. In the same lane as myself.

“Q. How far ahead of you was this other truck you refer to?

“A. Well, I would not say exactly, about possibly a length and a half or two lengths of track, not over 40 feet, 45 feet.

“Q. Do you know whether there was any other truck stopped at Bush Street as you approached it?  
“A. No, sir, I do not.

“Q. Do you know whether or not the other truck referred to that was ahead of you stopped for the signal?

“A. I do not know. I believe he stopped for the

(Deposition of C. A. Bailey.)

signal but he left right away. By the time I was out of my car or before, he was gone.

“Q. As you approached the intersection of Bush Street, Mr. Bailey, was the speed of the vehicle that you were operating diminished?

“A. Beg pardon? [116]

“Q. Did the speed of the truck you were operating as you approached Bush Street change, did you reduce your speed? “A. Yes, sir.

“Q. Was that because of the fact you were slowing down for the signal?

“A. I was slowing down for the intersection as I always do.

“Q. Well, you did in this particular case also?

“A. Yes. I was not going as I say over 15 miles an hour, which was not fast anyway.

“Q. You had previously—

“Mr. Makrauer: Just a moment.

“Mr. McCarthy: I am sorry.

“Mr. Makrauer: You were not going over 15 miles an hour, you said.

“The Witness: I do not believe so, 15 or 18 miles an hour. I will not say exactly; it has been a long time ago.

“Q. Can you give us an idea, Mr. Bailey, of the speed of the car, the pickup truck that was being operated by Mr. Fotopulos?

“A. I have no idea.

“Q. Well— “A. He was driving.

“Q. Can you refresh your memory and give us

(Deposition of C. A. Bailey.)

your best [117] judgment of his speed as he passed you?

"A. Well, I could not. I do not know as I could even estimate it, because I never saw the truck. You cannot see much except from a side view of the car. By that time he was right in front of me.

"Q. When the Fotopulos car passed you, how fast was the vehicle you were operating traveling?

"A. About 15 miles an hour.

"Q. Was he going faster than you?

"A. He must have been.

"Mr. Makrauer: Just answer the question.

"Q. Yes or No, was the Fotopulos car traveling faster than you were? "A. Yes, sir.

"Q. What part of the Army vehicle came in contact with the Fotopulos car?

"A. The right front corner of the bumper.

"Q. That is the right front corner of the Army vehicle? "A. Yes, sir.

"Q. Came in contact with what part of the Fotopulos car?

"A. The left rear of the pickup body.

"Mr. Makrauer: Hit the left rear.

"Q. Did I understand you to say it was your right front bumper that came in contact?

"A. With his left rear, yes. [118]

"Q. What was the condition of the street at that time?

"A. Well, it was very dry. an ordinary dry day. The pavement was dry.

(Deposition of C. A. Bailey.)

“Q. Was there anyone else riding with you in the Army vehicle at the time? “A. Yes, sir.

“Q. Who was in the car?

“A. There were three passengers. I can give you the names of two. The other I have forgotten.

“Q. Who were they?

“A. Private First Class Roy L. Hammond.

“Q. And Horatio Salazer, Sgt. Horatio Salazer?

“A. Salazer, yes, sir. There was one Army nurse in the car.

“Q. Do you remember her name?

“A. No.

“Q. Do you know whether or not the pickup truck ran into the truck that you say was operating ahead of you?

“A. The two trucks collided. How it happened I could not explain.

“Q. After you had come in contact with the Fotopulos truck, the pickup truck, the Fotopulos truck went forward and bumped into the car, the truck that had been going in front of you?

“A. I am not sure how it happened, whether he hit the [119] forward truck before he was hit by me or afterward, I do not know.

“Q. Did you strike or contact the Fotopulos truck or car with much force, Mr. Bailey?

“A. No, sir, not much.

“Q. Did you say the driver of the Fotopulos truck gave you no signal before he cut from the lane on your right-hand or east side into the lane you were operating in?

(Deposition of C. A. Bailey.)

“A. None whatsoever.

“Q. Did you have any conversation with Mr. Fotopulos?      “A. Very little.

“Q. Well, did you have any?      “A. Yes.

“Q. What did he say, if anything?

“A. Well, he merely took my name. He called a man from the garage at the intersection to come over and make out a report for me. This man took my name and address and that was all. He stated I would have to wait for a tow car, so we both waited until the tow-car removed his truck.

“Q. Did he make any references as to how the accident occurred?

“A. None whatsoever. He never even mentioned it.

“Q. Did you say anything to him with reference to the [120] way the accident occurred?

“A. No. My whole intention at the time was to give him a medical examination if he wanted it so there would be no case against me. He stated he was O.K.

“Mr. Makrauer: Answer the question, Did you say anything to Mr. Fotopulos?

“The Witness: Yes, I am trying to tell you I offered him a medical examination and he refused it.

“Q. Did he say whether or not he was injured?

“A. He said he was not.

“Mr. McCarthy: Your witness.”

Mr. Scholz: Do you want to read the cross?

Mr. Bucher: Yes, I will read the cross.

(Deposition of C. A. Bailey.)

(Reading) "Q. (By Mr. Makrauer): Where were you coming from just before this accident took place?

"A. The railroad yards, 6 King Street, San Francisco.

"Q. What was the purpose of the particular ride you were taking at that time?

"A. To retain rations from the car at the railroad depot.

"Q. Was that on the Army business?

"A. Yes, sir, the Army railroad cars.

"Q. You were headed where?

"A. To the Presidio.

"Q. Was that an Army camp? [121]

"A. It is an Army base, yes, sir.

"Q. What was your rank? "A. T-4.

"Q. Does that mean you were a sergeant?

"A. Yes, sir.

"Q. Will you describe the truck you were driving in, the body of the truck?

"A. It was an open body, steel cab.

"Q. With a sealed cab in front where you were sitting? "A. Yes.

"Mr. McCarthy: A steel cab.

"Mr. Makrauer: A steel cab, open on both sides.

"Q. The cab was open on both sides?

"A. No, sir, doors.

"Q. With windows in them?

"A. An enclosed cab, yes, sir.

"Q. And you stated there were three people besides yourself in the truck?



(Deposition of C. A. Bailey.)

“A. Yes, sir.

“Q. Will you tell us just where the three people were sitting?

“A. There was one in front with me, the Army nurse and the two others in the back.

“Q. How were the seats arranged in back, Mr. Bailey?      “A. Along the side of the body.

“Q. Looking at the chart you were going north, with the car going north, on what side of the truck were the seats located?

“A. Both sides, one on each side.

“Q. Which side were these two men sitting?

“A. I could not say exactly.

“Q. You do not remember that?

“A. I cannot see the back. It might be either side. I did not notice where they were. They might have been sitting on either side of the truck.

“Q. Was there an opening from the back of your cab where you were sitting to the rear of the truck?      “A. Yes, sir.

“Q. An open partition?      “A. A window.

“Q. Was that open?      “A. Yes, sir.

“Q. Could you talk to them and they could talk to you?

“A. No. You could see through it. It was not open.

“Q. I just asked you if that was open?

“A. It will not roll down. I understood you to mean visibility.

“Q. What happened to the Army nurse right after the accident?

(Deposition of C. A. Bailey.)

“A. Nothing whatsoever. [123]

“Q. Just after the accident occurred, didn’t an officer come right up, didn’t people come up to the scene of the accident?

“A. No, sir, nobody came near us. The police cruisers drove by us and never stopped.

“Q. What did the nurse do immediately after the accident?

“A. She sat right in the truck.

“Q. You cannot remember the name of that nurse now?

“A. No, sir. She was unacquainted with me. She was on the train. She took transportation with me back to the Presidio. The only reason I ever inquired her name was to put it on my accident report.

“Q. How did she get in the truck?

“A. She wanted transportation to the Presidio.

“Q. Where did this occur?

“A. In the railroad yards.

“Q. Did you pick her up?

“A. Yes, sir, that was my duty to pick up passengers down there as well as rations.

“Q. You mean it was your duty to pick up anybody that wanted a ride?

“A. Any passengers on our train that wanted to ride back to our base was welcome to ride.

“Q. She was not in uniform? [124]

“A. She was. She was coming in from duty.

“Q. At the time the accident occurred, did you report the accident?

(Deposition of C. A. Bailey.)

“A. I reported it as soon as I returned to the base.

“Q. To whom did you report the accident?

“A. It was reported to the motor pool and then to the main office on the post, the Provost Officer.

“Q. Did you tell the Provost Officer at that time there was a nurse sitting in the front cab with you?

“A. I did. She was signed on my report as a witness.

“Mr. McCarthy: Just a minute. He has not testified she was sitting in the front cab with me.

“Mr. Makrauer: Yes, he has. I asked him that.  
(The record was read.)

“Mr. McCarthy: I understood him to testify she was sitting in the back.

“Q. Two men in the back and the nurse in front? “A. That is correct.

“Mr. McCarthy: Was the nurse sitting with you?

“The Witness: In the front seat, yes, sir.

“Q. Can you tell us whether it was your duty to pick up passengers at the railroad station?

“A. I will not say it was a duty. It was customary.

“Q. I did not ask you that. I asked you—

“A. They were supposed to be furnished transportation. [125]

“Q. Just answer my question. You say now it was not your duty to pick up people?

(Deposition of C. A. Bailey.)

“A. I did not say it was not my duty. I did not say it was or was not.

“Mr. McCarthy: Is it material whether it was his duty or not? He testified she was there sitting in the front seat with him. I do not think it is material or relevant whether or not it was his duty.

“Q. The passengers were in the front seat with you, seated on the front seat and you were driving the truck? “A. Yes, sir.

“Q. And the other two, Salazer and Hammond, were sitting in the back of the truck?

“A. Yes, sir.

“Q. You cannot recall what side of the truck they were sitting on?

“A. No, sir. I have no idea.

“Q. You state definitely you reported this Army nurse was sitting in the front seat with you when you made the report to the Provost Marshal?

“A. There were no questions asked as to where anybody was sitting. I reported them as witnesses and that is all. They were riding with me.

“Q. Mr. Bailey, will you take a pencil and draw a line and show me the exact course of travel of your car. Now [126] this is a white line separating the lanes of traffic on Van Ness Avenue?

“A. Yes, sir.

“Q. Will you start at the beginning of the chart with the pencil and mark just how you came up?

“Mr. McCarthy: Just a minute now. May I

(Deposition of C. A. Bailey.)

straighten it out on that chart marked Plaintiff's Exhibit 3 which you referred to, the white line is in fact a red line, but it is a white line on the street.

“Mr. Makrauer: There is a white line on the street, that is correct. There is a note, all red lines are painted white on the street. It is just shown as red.”

Mr. Bucher: May I pause for a moment, if the Court please, and suggest that evidently an exhibit is attached to the original deposition. I have no copy of the exhibit. May I examine it just a moment? I haven't seen it.

The Court: It is. This so-called chart or diagram may be marked in evidence by stipulation?

Mr. Scholz: Yes, your Honor. I haven't seen it either.

(Counsel examined chart.)

The Clerk: Are you offering it?

Mr. Scholz: Yes, it is a part of our deposition. I think maybe the Court would like that marked.

The Clerk: Three for identification?

The Court: Is that in evidence? [127]

Mr. Scholz: That is in evidence, your Honor.

The Clerk: Three in evidence.

Mr. Scholz: That is part of the deposition of Charles Arthur Bailey.

The Court: It may be received.

(Chart referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 3.)

(Deposition of C. A. Bailey.)

M. Bucher (Reading): "Q. Which is the line of traffic? "A. Right here (indicating).

"Q. In the middle of the lane going due north?

"A. Yes, sir.

"Q. Now, will you continue that lane as best you can with what you have drawn, what is there now and show us just where the cars were immediately after the collision between yourself and the Dodge truck?

"A. Right here in this spot here."

The Court: You desire a ruling on this, or do you wish to withdraw it?

Mr. Bucher: I am not asking for a ruling. Counsel may.

Mr. Scholz: Yes, your Honor, I think there is evidence that the witness is out of the Army and is trying his best to give his recollection, and that he had testified considerably on this. I think the matter is objectionable, and I will join with the Assistant United States Attorney in that objection.

The Court: The objection is overruled. [128]

Mr. Bucher: (Reading) "Q. I want you to draw that exactly with reference to the safety zone and the crosswalk at the intersection. Will you draw it showing the position of your car and the position of the Dodge truck immediately after the accident? "A. It is very hard to do.

"Q. There is plenty of room there. This is a fair representation of the intersection?

"A. Yes, but as examples A and B are much too small to be fitted in the lane.

(Deposition of C. A. Bailey.)

“Q. Make them smaller so they will fit.

“A. They should be larger.

“Q. Make it in plain. This is a scale drawing. As a matter of fact, do you know how wide this lane is?

“A. No, I have no idea, probably about 10 feet.

“Q. Between the easterly side of the car track that is there? “A. Yes, sir.

“Q. And the curbstone which is here, could you estimate the width of that area for us?

“A. No, I would not try to.

“Q. Do you know how long this room is here?

“A. About 15 feet, probably.

“Q. This way, I mean? “A. Yes, sir.

“Q. It is nearer 20 to 25.

“Mr. McCarthy: Oh, now, no, I object to that. It is not 25 feet.

“Q. This accident happened less than a year ago, didn't it? “A. Yes, sir.

“Q. Haven't you some estimate of the width of those two lanes of travel between the easterly side of the car track and the curbstone?

“A. No, I could not give an estimate. It would be merely an estimate.

“Q. Give us that.

“A. As I say, each lane would not be over 10 feet wide, probably making it 20 feet.

“Q. This line represents your line of travel, you have drawn here? “A. Yes, sir.

“Q. You have drawn this car and marked it A. Did you intend to have that car straight?

(Deposition of C. A. Bailey.)

“A. No, sir.

“Q. You wanted it on a slant?

“A. My vehicle was parked with my left front wheel on the safety zone. His vehicle was parked there.

“Q. Show us exactly where your car was immediately after the accident when you came to a stop? [130]

“A. If I may be permitted to change this here, I can bring it on a different scale.

“Mr. Makrauer: Is that all right with you, Mr. McCarthy?

“Mr. McCarthy: You are talking about it after the accident is over.

“Mr. Makrauer: Immediately after the accident when all cars were at rest.

“Q. Show me where your car was and where the Dodge truck was you testified you hit.

“Mr. McCarthy: Do you want to erase this?

“Mr. Makrauer: Mark this A.

“Mr. McCarthy: Mark his car A.

“Q. That is B, the Dodge truck?

“A. Yes, sir.

“Q. Will you now show us where the car you testified to that had stopped for the red light was?

“A. I do not know where it was because he had left the scene, he was in front of me, and by the time I was out of my vehicle, he had left the scene.

“Q. Where was he the last time you saw him?

“A. Proceeding north on Van Ness Avenue in front of me.



(Deposition of C. A. Bailey.)

“Mr. Makrauer: I may be wrong, didn’t he testify it stopped for the red light?

“Mr. McCarthy: I do not believe so. [131]

“Q. Didn’t you tell us on direct examination there was a car here that stopped for the red light in the same lane of traffic?

“A. No, sir. I testified once before, I told you I was not sure of the color of the light at the time this other truck and myself approached the intersection.

“Mr. Makrauer: Could we go back to that a minute?

“(The record was read.)

“Mr. Makrauer: He testified there was a truck—

“Mr. McCarthy: He never testified, according to the Commissioner’s notes, he said he testified that the other truck stopped at a red light.

“Mr. Makrauer: I did not ask him that.

“Mr. McCarthy: I think you have. Whether you asked him, he did not testify to that.

“Q. You testified there was another truck ahead of you?

“A. Yes, sir.

“Q. On direct examination?

“A. Yes, sir.

“Q. Where was that truck? Will you show it to us on the plan?

“A. Proceeding north on Van Ness Avenue. He was ahead of me. I was following him.

“Q. Show us on the plan where he was when you first saw him ahead of you. [132]

(Deposition of C. A. Bailey.)

“A. When I first saw him he was two blocks down the street at Post Street. I followed him to this particular spot.

“Q. When you followed him to this particular spot, where was he?

“A. That I do not know. I was not watching him. I was merely watching my vehicle, and the vehicle directly in front of me, Exhibit B.

“Q. You do not remember very much about this accident at all?

“A. Truthfully I do not.

“Mr. McCarthy: Just a minute. I object to that question. He has testified considerably about the accident.

“Mr. Makrauer: Well, he has just testified that there was another truck a truck length or two truck lengths and suddenly this truck disappears. I would like to know where it was and where it went.

“Mr. McCarthy: He says he does not know, he says it kept on going.

“Q. Then you testified that this truck here, the Dodge truck, after you hit it, hit the truck ahead of you. How do you know that?

“A. I did not testify to any such thing.

“Mr. Makrauer: Go back to the direct examination again.

“The Witness: I will say— [133]

“Mr. Makrauer: Just a minute.

“Mr. McCarthy: Just a minute. Let him answer if he can.

(Deposition of C. A. Bailey.)

“Mr. Makrauer: Repeat my question to him.

“(The record was read.)

“Q. Then you did testify there was a truck there at the time this accident occurred, didn't you, Mr. Bailey?      “A. Yes.

“Q. Do you want to change that now?

“A. No.

“Q. Will you tell us where the truck was? Will you show it?

“A. I do not know where it was. All I know is the marks of Mr. Fotopulos' truck where he hit the other forward truck.

“Q. You want to leave it there was a car ahead of you, that Mr. Fotopulos hit the truck and you cannot tell us where the truck was?      “A. No.

“Mr. McCarthy: He does not say he does not know where it was, he does not know where it went.

“Q. I am asking you where the truck was when Mr. Fotopulos hit it after you hit Mr. Fotopulos, that is all I am asking you.

“A. That would only commit me. I do not know whether he hit the truck. He might have hit it before I hit him. [134]

“Q. You do not know what happened?

“A. I do not know. I hit him, that is all I know.

“Q. How is it you are so certain the right-hand corner of your truck hit the left-hand rear corner of the Fotopulos truck? Why are you so certain about that if you cannot remember anything else? Why do you remember that so distinctly?

(Deposition of C. A. Bailey.)

"A. That was my part of the accident. The other was not.

"Q. That is the way you want to leave that?

"A. Yes, sir.

"Q. Well, now, will you show us on this chart where you were, make the X on that line of travel where you were, put it wherever you were exactly when you first saw the Dodge truck.

"A. Approximately here, I would say (indicating).

"Q. Right there?

"A. I did not travel the length of my truck before I stopped.

"Q. Just answer the question. You have marked with an X where you first were when you first saw the Dodge truck. Is that correct?

"A. Yes, sir.

"Q. Will you take your pencil and show me with a line the line of travel of the Dodge truck after you first saw it? [135]

"A. Yes, sir.

"Mr. Makrauer: I would like to identify that.

"Mr. McCarthy: That is right, it should be identified.

"Q. Will you mark the defendant's line of travel?

"Mr. McCarthy: Mark it Y.

"Mr. Makrauer: Put a Y there.

"Mr. McCarthy: Put it over there where it is.

"Mr. Makrauer: Right here.

"Mr. McCarthy: Where he says the line of travel was on the Dodge truck.

(Deposition of C. A. Bailey.)

“Mr. Makrauer: I am talking about his line of traffic.

“Mr. McCarthy: I thought you identified that as X.

“Mr. Makrauer: That is the spot where he first saw the Dodge car.

“Mr. McCarthy: I suggest you mark the line of traffic of the Dodge truck, the Fotopulos truck, mark it Y.

“Mr. Makrauer: All right, mark it Y.

“Q. When you first saw the Dodge truck you were at the place marked X. Show us where the Dodge truck was with a Z.

“Mr. McCarthy: Let us get the question again.

“Mr. Makrauer: Will you show us where the Dodge truck was in its line of travel in the Dodge's line of travel when you were at the point marked X.

“Mr. McCarthy: Z.

“Q. Can you tell us how far it is from X to the point [136] where you hit the Dodge truck? Can you estimate that distance for us?

“A. Approximately 20 feet.

“Q. Could you tell us—

“A. More than that, I will say 35 feet.

“Q. Can you tell us how far it is from the point marked Z to the point where you hit the Dodge truck?

“A. No, I do not think I could. It is just approximate, probably 65 feet, 60 or 65.

(Deposition of C. A. Bailey.)

“Q. It was 30 feet from the point X to where you hit the Dodge truck?

“A. Approximately.

“Q. Sixty feet from where you first saw the Dodge truck to where you hit it?

“A. Just approximately, I would not say for sure.

“Q. You want to leave that that way?

“A. As approximate, yes, as far as the length goes, I have no estimate of it. That is something—

“Q. That is your best estimate?

“A. That is the best I can estimate.

“Q. And this car you cannot place anywhere now. If I am wrong in this, jump me, Mr. McCarthy, this car that was ahead of you in your line of traffic you cannot place anywhere now, was a truck and a half or two truck lengths ahead of you along the line of travel as you approached [137] the intersection? “A. Yes, sir.

“Q. Were there any cars in the line, the right-hand lane looking north next to the curb going along here? “A. I have no idea.

“Q. Did you see any cars?

“A. I was looking merely at what was happening here.

“Q. Was there anyone standing in the safety zone here? “A. No, sir, no one.

“Q. Not a soul? “A. Not a soul.

“Q. You testified that the center car tracks were a line of traffic. You do not mean that?

“A. I do.

(Deposition of C. A. Bailey.)

“Q. Do you mean it was a paved street with tracks inserted?

“A. Yes, sir.

“Q. There were no cars on it, were there, at the time of the accident?

“A. I would not say. There might be.

“Q. You do not know as a matter of fact whether it is used for travel or not, do you?

“A. I do. It is used for travel.

“Q. You are acquainted with Sgt. Hammond and Sg. Salazer?

“A. Fairly well. They worked with me. [138]

“Q. Right after the accident did you talk to them?

“A. No, merely that they signed my accident report and that was all.

“Q. They signed your accident report?

“A. Yes, sir.”

The Court: Counsel, I understand that in any event we will have to run tomorrow morning in the completion of this case.

Mr. Bucher: Yes, sir.

The Court: We will close the reading for today at the bottom of page 28, the last line, and the answer.

Mr. Bucher: Very well.

The Court: I would suggest, counsel, in the light of the conditions which Mr. Mitchell has outlined and the thought that if this case be continued, it would not be reached until some date next year, that we had better proceed with the deposition

(Deposition of C. A. Bailey.)

and the reading thereof as to the other gentlemen, Hammond—is that his name?

Mr. Bucher: Yes, Your Honor, Hammond.

The Court: Very well.

Mr. Scholz: Whatever Your Honor says on that.

Mr. Bucher: I will be away during January and February anyway, and this deposition was full and complete at the time.

Mr. Scholz: Would your Honor like to have my offer of this [139] statement of the doctor in support of my statement? The statement from the doctor at the Letterman General Hospital?

The Court: Well, I accept your statement for the record. There is no dispute of that?

Mr. Bucher: We made no objection to that at all.

The Court: And the medical reports which were referred to during the cross-examination of the doctors have been marked for identification?

Mr. Bucher: Only, yes.

Mr. Scholz: All I have is the copy of the medical reports which the Federal Bureau of Investigation made in their report here. These are exact copies.

The Court: Well, Mr. Scholz, during your examination of several doctors, you have referred to certain basic reports.

Mr. Scholz: That is right.

Mr. Bucher: Those are the pathological findings, I believe, if the Court please. That is what we are referring to.



(Deposition of C. A. Bailey.)

The Court: They were three in number?

Mr. Scholz: That is right, I have the copies of them here.

Mr. Bucher: I haven't seen those.

The Court: Counsel, you examined them during the recess?

Mr. Bucher: Oh, yes, I have seen those.

The Court: And you agree upon them, merely for the purpose of identification so that they are here and hereafter there will be no question concerning the record? [140]

Mr. Scholz: That is right.

Mr. Bucher. That is right.

The Court: Well, we will stand adjourned until tomorrow morning at 10:00 o'clock for the further trial of this case.

(Thereupon an adjournment was taken until

10:00 o'clock, December 5, 1947.) [141]

Friday, December 5, 1947, 10:00 o'clock a.m.

The Court: All right, counsel, you may proceed.

Mr. Bucher: May it please the Court, I believe at the close of yesterday's session we were at the bottom of page 28 and were reading the deposition of Charles Arthur Bailey.

The Court: Yes.

Mr. Bucher: With the Court's permission, I will proceed.

"Q. (Reading): Is this testimony you are giving here what you had in your accident report?

"A. Yes, sir.

(Deposition of C. A. Bailey.)

"Q. Have you seen that accident report since you filled it out?

"A. Yes, sir.

"Q. When did you last see it?

"A. About a week after it was made out.

"Q. You have not seen it since?

"A. No, sir.

"Q. You now tell us Sgt. Salazer and Sgt. Hammond signed that report which in substance contains the testimony you gave here today?

"A. Whether they signed it or gave me their names and I put their names on the report, I would not say. I know their names were on the report as witnesses.

"Q. Right after the accident occurred, Mr. Bailey, [142] what did you say to anyone?

"A. Nothing.

"Q. You testified you spoke to Mr. Fotopulos?

"A. Merely as a means of getting his name and address.

"Q. Did you say at that time your brakes were not working?

"A. I said they were working, in fine A-1 condition.

"Q. To whom did you say that?

"A. I did not tell anybody that in particular. I know it myself as the fact.

"Q. To whom did you tell the brakes were working fine?

"A. No one at the scene. That was put in my reports to the Provost Officer.

(Deposition of C. A. Bailey.)

“Q. Didn’t you see two men run out from the curbstone on the easterly side of Van Ness Avenue, run out toward the scene of the accident?

“A. No, sir, nobody approached the accident to my knowledge.

“Q. Immediately after the accident occurred?

“A. No, sir.

“Q. Can you tell us now, you do not know where Sgt. Salazer and Sgt. Hammond were sitting?

“A. No, sir. I know they were in the back of my truck, that is all I know.

“Q. Did you examine your car right after the accident? [143]

“A. Yes, sir.

“Q. Did you examine the Dodge truck?

“A. Yes, sir.

“Q. Will you tell us as exactly as you can the damage to the front end of your car immediately after the accident?

“A. Just about that much of the bumper had a crease in it (indicating).

“Q. That much. How much is that?

“A. About 15 inches.

“Q. 15 inches of your bumper had a crease in it?

“A. Yes, sir.

“Q. What part of the bumper?

“A. The extreme right end.

“Q. That is all the damage there was to your car?

“A. Yes, sir.

“Q. Did you examine the Dodge truck?

“A. Not too closely.

(Deposition of C. A. Bailey.)

“Q. Did you examine it?           “A. Partially.

“Q. It was right there in front of you?

“A. Yes, sir.

“Q. What damage did you see on the Dodge truck and exactly where was it, will you tell us?

“A. There was no damage in sight. [144]

“You could see that the frame had been sprung. It had a sag in it. Other than that, I do not know.

“Q. Let this book represent a car.

“A. All right.

“Q. This is the front and this is the rear.

“A. Yes, sir.

“Q. I am holding the book as though I was going to read it. The front of the car is the front of the book. The rear of the car is the rear of the book. The left side of the car is the left side of the book and the right side of the car is the right side of the book?

“A. Yes, sir.

“Q. One thing you noticed about the Dodge truck, it had a sag in the middle. Take the book as though it were the car. The sag was a sort of sway back horse?           “A. Yes, sir.

“Q. What did you notice about the rear of the Dodge truck?           “A. Nothing.

“Q. Nothing at all?           “A. No, sir.

“Q. No damage to the rear of it?

“A. There was hardly a mark on it.

“Q. On the rear of the car?

“A. Hardly a mark on it. [145]

“Q. Did you notice the front of the Dodge truck?           “A. Yes, sir.

(Deposition of C. A. Bailey.)

“Q. What damage did you see to the front of it?

“A. The top part of the grille and the headlights were punched back.

“Q. Caved in? “A. Yes, sir.

“Q. The front of the car was caved in and the rear of the car had hardly a mark, no marks at all on it? “A. That is right.

“Q. No mark where your right hand it. There was hardly any visible damage where the front right part of your car hit the left rear part of the Dodge car? “A. That is right.

“Q. No damage to the mudguard of the Dodge car?

“A. It did not touch the mudguard. It touched the body, the left rear corner of the body. The fender was untouched.

“Q. Is this a fair description, the Dodge truck was bent in the middle like a sway back horse?

“A. Yes.

“Mr. McCarthy: We have had that three or four times.

“Q. You had no talk about this accident with Sgt. Salazer and Sgt. Hammond?

“A. No, sir. [146]

“Q. Never discussed it with them?

“A. No, sir.

“Q. Do you know whether they saw the accident? “A. Certainly they did.

“Q. They saw it?

“A. Yes, they made that statement themselves. They made the statement they saw the accident, yes, sir.

(Deposition of C. A. Bailey.)

“Q. You had no discussion after the accident with them about it.

“A. None whatsoever.

“Q. I would just like you to recall again how fast you were going just before the contact took place?

“A. Approximately 15 miles an hour.

“Q. Can you tell us how fast you were going when you were at the point X, which is where you first saw the Dodge car?

“A. About the same speed.

“Q. About the same speed, 15 miles an hour?

“A. Yes, sir.

“Q. How far would you say it was from the point X in your line of travel to the crosswalk, to the southerly line of the crosswalk on Bush Street?

“A. I would not estimate. I have no idea.

“Q. But whatever the distance was, where you place that car is a fair representation of where it was with reference [147] to the safety zone and the cross-walk? “A. Yes, sir.

“Mr. McCarthy: Just a minute. We are not going to be bound by it. I am objecting to the question, we are not going to be bound by the size of these cars he drew on the map with reference to the cross-walk.

“Mr. Makrauer: No, but I would like to put it this way, Mr. McCarthy.

“Q. The point X is placed approximately in the position with reference to the safety zone and cross-walk correctly, isn't it?

(Deposition of C. A. Bailey.)

“A. I would not say to scale because I do not know. As far as this goes, I could not tell you the wheel base length of my truck.

“Q. Is that a fair representation with reference to the safety zone and cross-walk where the cars were after the accident occurred, immediately after the accident?

“A. This is the position of these two vehicles here, yes.

“Q. With reference to the safety zone?

“A. Yes, sir.

“Q. X is where you first saw the Dodge car?

“A. Yes, sir.

“Q. From between the point X and the point of contact you did not slow down, did you, Mr. Bailey? [148]

“A. Yes, sir.

“Q. You told us you were going about the same speed, 15 miles an hour?

“A. You asked me——

“Mr. Makrauer: Repeat the question I asked him at that point about how fast he was going in cross-examination.

“(The question was read.)

“Q. So that between X and the point of contact you had not slowed down?

“A. In other words, you are trying to say——

“Q. Just a minute. In other words, between the point X and the point of actual contact in view of your answer, you did not slow down, did you?

“A. I did.

(Deposition of C. A. Bailey.)

“Q. Then which of these answers is correct?

“A. Your question, as he just read it, said how fast was I going at the point X and how fast was I going just before I hit him.

“Q. That is right. That is what I asked.

“A. I say the speed was the same between that time and when I hit him. I had applied my brakes.

“Q. The speed was the same?

“A. Certainly not.

“Q. You just said that?

“A. How can the speed be the same when a man applies [149] his brakes?

“Mr. McCarthy: Let him answer the question. You are arguing with him and inviting him to argue back with you.

“Q. You were going 15 miles an hour at the point marked X?

“Mr. McCarthy: We have that seven or eight times in the record, I think.

“Q. Were there any cars in this so-called third line of traffic?

“A. I do not know. I was not watching the third line of traffic.

“Q. As you approached Bush Street, did you see the traffic signal on the corner of Bush and Van Ness Avenue?

“A. I did not see it. I do not remember looking at it. I know it was **there**.

“Q. Did you see what color it was?

“A. No.

“Q. Did you notice at any point along this line



(Deposition of C. A. Bailey.)

of travel as you approach Bush Street whether the light was red or green?

“A. It is impossible to see the lights in San Francisco on Van Ness Avenue. You will find a lamppost sitting directly in back of the stop signs. It is a distance of about three feet. You can take my word or it can be checked. The lights cannot be seen until you approach [150] at least one-third of the distance of the block. It is all of that before you can see the light.

“Q. Putting it another way, how far from the intersection do you say you are before you can see that traffic light coming up Van Ness Avenue from Bush Street?

“A. About one-third of the block.

“Q. How many feet would that be, have you any idea?

“A. Going in the direction of Bush Street?

“Q. Going in the direction of Bush Street, of course?

“A. Not knowing the length of the block I would not be able to say.

“Q. You can see it in plenty of time to stop for it? “A. Yes, sir.

“Q. Did you see it?

“A. No. I was not looking at it. I was looking at this scene here, which was the immediate happening instead of stopping for a stop light.

“Q. Even with this scene here, weren't you near enough to see whether it was red or green?

(Deposition of C. A. Bailey.)

"A. If I had been looking, if I was to look at the stop light I would not have seen him.

"Q. Do you know whether it was red or green?

"A. No, I do not.

"Mr. Makrauer: That is all."

Mr. Bucher: And that completes the cross-examination, if [151] the Court please.

The Court: Is there any redirect?

Mr. Bucher: There is a short redirect and short recross.

Mr. Scholz: If Your Honor please, on the re-direct examination questions were by Mr. McCarthy. (Reading)

"Q. (By Mr. McCarthy): My brother asked you to designate on Plaintiff's Exhibit 3 by marking X where you were when you first saw the Fotopulos car. Is that right? "A. Yes, sir.

"Q. You marked in the east lane on your right Z where the Fotopulos car was when you first saw it with reference to X. Is that right?

"A. Yes, sir.

"Q. Now, according to the marks, X and Z on this chart at that time the Fotopulos car was over at the next line to your right? "A. Yes.

"Q. Between the point marked Y and the point marked B, he took the direction as indicated by Y on the chart. Is that right?" "A. Yes, sir.

"Q. So that he cut from your right or from the lane he was in, the one he was operating in according to the designations X and Z, cut over into the lane you were operating in? [152]

(Deposition of C. A. Bailey.)

“A. Yes, sir.

“Q. And gave no signal?

“A. That is right.

“Q. So that it is fair to say you could not avoid hitting him?      “A. That is right.

“Mr. Makrauer: I object. It speaks for itself. I object to the last question, Mr. Commissioner, I object to the form of the question and the answer.”

The Court: Do you press the objection?

Mr. Bucher: Well, at this time we press the objection that the question is, so to say, “you could not avoid hitting him?” I think that question is objectionable.

The Court: What is the page number?

Mr. Bucher: That is page 37, toward the bottom of the page.

Mr. Scholz: Towards the second line from the bottom.

Mr. Bucher: In other words, it puts an opinion in the witness’ mouth.

The Court: Yes. The question, So that it is fair to say that you could not avoid hitting him?,—I will sustain the objection to that question, and the answer may be stricken.

Mr. Scholz: Redirect examination.

Mr. Bucher: This is short, Your Honor.

The Court: Mr. Reporter, did you make a note of that [153] ruling?

The Reporter: Yes, I did, Your Honor.

Mr. Bucher (Reading): “Q. (By Mr. Makrauer):

(Deposition of C. A. Bailey.)

But the cars immediately after the accident were in the position you saw them on the chart?

"A. Yes, sir.

"Q. Your car is A and the Dodge truck is B?

"A. Yes, sir.

"Q. Now, you are certain of that?

"A. Positive.

"Q. That when the cars came to rest they were in this position? "A. Yes, sir.

Mr. Bucher: May I ask, if the Court has that chart, the exhibit?

The Court: I have it in mind. I gave it to the Clerk.

Mr. Bucher: He refers to "this."

The Court: It has been marked in evidence.

Mr. Bucher: He refers to "this position."

The Court: I have the relative positions in mind.

Mr. Bucher: All right.

The Court: I know where the X is, and I know where the B and the A are.

Mr. Bucher: Very well, you know the angle.

The Court: And I recall there was an erasure in the [154] original instance, and then superimposed on that there was something else.

Mr. Bucher: That is correct.

The Court: I have the factors in mind.

Mr. Bucher: All right, I will proceed, then.  
(Reading):

"Q. Your truck here. This truck at the right-hand corner of your car up against the left rear of the Dodge truck? "A. That is right.

(Deposition of C. A. Bailey.)

“Q. And you tell us the car that had been ahead of you was nowhere in sight?

“A. He might be at the time, but he was not when I got out of my truck. It is evidence he was there at the time of the accident.

“Q. Then you do not know whether the Dodge truck hit the truck in front or not, do you?

“A. No, I do not know, to come right down to it.

“Mr. McCarthy: You know from the damage to the front.

“Mr. Makrauer: Just a minute. Do not answer until I hear this question.

“Mr. McCarthy: Do you know from having examined the Dodge truck as to whether or not the grille work in the front of the Dodge truck was damaged?

“The Witness: It was.

“Mr. Makrauer: That is all.

“Mr. McCarthy: That is all.” [155]

Mr. Scholz: If your Honor please, I have a stipulation on the deposition.

Mr. Bucher: We will waive that.

Mr. Scholz: I will offer that to make the record complete, if you think——

Mr. Bucher: Very well.

Mr. Scholz: Mr. Clerk, I will just offer that in stipulation.

Mr. Bucher: We will waive the reading of the stipulations.

The Court: This is the deposition of a passenger, one of the passengers taken on behalf of the

(Deposition of R. L. Hammond.)

defendant, the deposition of Roy Lee Hammond.  
You may proceed, Mr. Scholz.

Mr. Scholz: Would your Honor wish me to read the preliminary?

The Court: No, it has been dispensed with.

Mr. Scholz: "ROY LEE HAMMOND,  
called as a witness on behalf of defendant; sworn.

"Direct Examination"

The Court: Mr. Scholz, is it stipulated that the reporter may take only the objections?

Mr. Scholz: Yes, so stipulated.

Mr. Bucher: I will join in the stipulation, your Honor.

The Court: All right, proceed.

Mr. Scholz: "Mr. Scholz: Q. What is your name?

"A. Roy Lee Hammond. [156]

Q. What is your occupation? A. Army.

Q. You are a corporal in the Army of the United States of America? A. That's right.

Q. Were you in the Army on the 23rd day of December, 1946? A. Yes.

Q. Calling your attention to the morning of that day, were you riding in an Army vehicle going north on Van Ness Avenue? A. Yes.

"Mr. Scholz: Will it be stipulated that Van Ness Avenue generally runs north and south?

"Mr. Bucher: And Bush Street east and west.

"Mr. Scholz: Bush Street east and west.

Q. As this vehicle in which you were riding approached Bush Street, did anything happen?

(Deposition of R. L. Hammond.)

A. Yes.

Q. Would you state what happened?

A. A '36 Dodge pick-up came up beside us and cut his truck over into the lane we was in.

(The answer was read by the reporter.)

“Q. (Mr. Scholz): Was Van Ness Avenue at that time divided into lanes? A. Yes.

Q. There are two street car tracks on Van Ness Avenue? [157] A. Right.

Q. On each side of the street car tracks are there lanes? A. Two lanes on each side.

Q. Two lanes on each side. As this Army vehicle approached Bush Street on Van Ness Avenue, what lane was it traveling in?

A. It was in the left lane next to the safety zone.

Mr. Bucher: Mr. Scholz, why don't you have him draw a rough pencil diagram in connection with his testimony? Wouldn't it be easier if you prepared one and let him designate the lines and where he was? I think that would be easier.

Mr. Scholz: All right. That is pretty rough (referring to pencil diagram after preparation).

Mr. Bucher: That's all right. It will be better. It will expedite his testimony, I am sure.

Q. (Mr. Scholz): Is that the idea, there?

A. Yes. Those are street car tracks there (indicating).

Q. Yes. Those are street car tracks.

Mr. Bucher: Mark your lanes.

Mr. Scholz: That is west.

(Deposition of R. L. Hammond.)

Mr. Bucher: No, you are wrong. That should be east.

Mr. Scholz: Is that right?

The Witness: That's right. In other words, that would be in the west lane.

Q. (Mr. Scholz): Do you mean the lane nearest the [158] street car tracks? A. Yes.

Q. It was the lane on the right-hand side of Van Ness Avenue nearest to the street car tracks; is that correct? A. That's right.

Q. Now, as you left Sutter Street and traveled toward Bush Street, the next street, as you left Sutter Street going north about how fast was this vehicle traveling?"

The Court: "this vehicle," meaning the Army vehicle?

Mr. Scholz: That is right. (Reading)

"A. 15 miles an hour.

Q. About 15 miles as you left Sutter Street?

A. No. That is what we drove between the streets; we was just taking off——

Q. Listen to my question: As you left Sutter Street, the street before you came to Bush going north on Van Ness Avenue, about how fast was the Government vehicle traveling?

A. 10 miles an hour.

Q. As you left Sutter Street it was going 10 miles an hour?

A. Not when we left it, no. You are getting me confused. We had stopped at Sutter Street.

Q. You had stopped at Sutter Street?



(Deposition of R. L. Hammond.)

A. We started up from Sutter Street and between Sutter Street and Bush Street he got around 15 miles an hour. [159]

Q. Now, as you approached the intersection of Bush and Van Ness Avenue, did anything occur there outside of this car coming in front of you?

A. Yes. There was another truck setting in the east lane at the stop signal.

Q. There were stop signals at that intersection of Bush?"

The Court: Read that again, will you go back over that again? Just before the stop signal. Would you read a little bit more slowly?

Mr. Scholz: I am sorry.

The Court: It isn't any reflection on you, but there is a certain jargon and a monotony, not especially on your part, in reading depositions. We have to look out and read it just as slowly as you can.

Mr. Scholz: I appreciate that.

The Court: That applies to trying cases before juries as well as before a court.

Mr. Scholz (Continues reading): "Q. Now, as you approached the intersection of Bush and Van Ness Avenue, did anything occur there outside of this car coming in front of you?

A. Yes, There was another truck setting in the east lane at the stop signal.

Q. There were stop signals at that intersection of Bush? A. Yes. [160]

Q. And Van Ness Avenue? A. Yes.

Q. And the stop signal there said "Stop"; is that it? A. Yes.

(Deposition of R. L. Hammond.)

Q. Was there any car ahead of you, any vehicle ahead of you? When I say "ahead of you," I mean the vehicle that you were riding in.

A. You mean ahead of us in the lane we were in?

Q. Yes.           A. No.

Q. Was there any vehicle in the lane that was nearest to the curb?

A. Yes, there was a truck.

Q. Did that truck stop at the stop signal?

A. Yes.

Q. As you approached this intersection was the speed of the Army vehicle decreased?

A. Yes.

Q. Why?

A. He was slowing down for the stop signal.

Q. As you slowed down for the stop signal did anything occur?

A. Yes. There was a '36 Dodge pick-up come up the east side of us and come over in our lane.

Q. In other words, this pick-up truck was traveling on the [161] lane nearest the curb?

A. Yes, the east side.

Q. And it cut in front of the Army vehicle?

A. Yes.

Q. At the time that that cut in front of the Army vehicle approximately how fast, if you recall it, was the Army vehicle traveling?

A. 10 miles an hour.

Q. Approximately how fast was this pick-up truck traveling that cut in front of the Army vehicle?

(Deposition of R. L. Hammond.)

A. Between 15 and twenty miles an hour.

Q. What did this truck that cut in ahead of the Army vehicle do?

A. Well, he cut in front of us; we hit his left rear of his truck.

Q. You say "we." You mean the Army vehicle in which you were riding hit his——

A. Left rear.

Q. Left rear——

A. With the right front bumper.

Q. With the right front bumper of——

A. Of the Army vehicle.

Mr. Bucher: Right front bumper, did he say?

Mr. Scholz: I think you said the right front bumper of the—— [162]      A. Army vehicle.

Q. Army vehicle hit the left rear of the——

A. Dodge pick-up.

Q. Of the Dodge pick-up truck.      A. Yes.

Q. I show you here a picture and ask you if you can identify that picture.

A. Yes; this is the Army truck.

Q. Was that the Army vehicle truck that you were riding in?      A. Yes.

Q. Do you know whether that picture was taken before or after the accident?

A. It was taken after the accident.

Q. How do you know that?

A. This crease in the bumper.

Mr. Scholz: I will ask this be identified.

Mr. Bucher: Mr. Scholz, if you know that that

(Deposition of R. L. Hammond.)

was taken after the accident I will stipulate that it was.

Mr. Scholz: It was.

Mr. Bucher: All right. I will stipulate.

Mr. Scholz: The FBI took the picture."

The Court: When was the picture taken?

Mr. Scholz: It states in here, I think. Yes, 7/8/47. That is July 8, 1947.

Mr. Bucher: Six months—July 8th, pardon me.

Mr. Scholz: July the 8th.

The Court: 1947?

Mr. Scholz: 1947.

The Court: The accident happened when?

Mr. Scholz: December 23, 1946.

The Court: And this picture was taken in '47?

Mr. Scholz: It was taken in July of '47.

The Court: The truck has been in use all of that period of time?

Mr. Scholz: I don't know. I would presume so, but I don't know.

The Court: Did you stipulate to the admission of this photograph?

Mr. Bucher: I did stipulate as to the photograph, but the picture——

Mr. Scholz (Continuing reading):

"Mr. Bucher: Mr. Scholz, if you know that that was taken after the accident I will stipulate that it was.

Mr. Scholz: It was."

Mr. Bucher: The picture was taken after the accident. That was my stipulation.

(Deposition of R. L. Hammond.)

Mr. Scholz: I think that the testimony shows that the mark was a crease or a breaking of a little paint on the right-hand side, the right front side of the Army vehicle, and that it is still there. [164]

The Court: Well, you might agree on that later in the case. All right, you may proceed.

Mr. Scholz (reading):

“Mr. Bucher: Yes; I will stipulate that it was taken after.

Mr. Scholz: I offer that in evidence as Defendant's Exhibit A.

Mr. Bucher: No objection.

(The photograph was marked Defendant's Exhibit A.)

Q. (Mr. Scholz): You referred to the bumper. What is that bumper made of, do you know?

A. Steel.

Q. You say there was a mark or crease on this bumper? A. Yes.

Q. That is the right-hand side of the vehicle?

A. Yes.

Q. Looking from the car? A. Yes.

Mr. Bucher: Pardon me, Mr. Scholz. Can you establish from your record when that picture was taken?

Mr. Scholz: The picture was taken, according to the report given me, on 7/8/47; that would be July 8.

Mr. Bucher: July 8th of this year.

Mr. Scholz: 1947.

Q. (Mr. Bucher): Do you know of any other damage that [165] was done to that truck at that time, outside of that?”

(Deposition of R. L. Hammond.)

The Court: Who was answering the question put by Mr. Bucher?

Mr. Scholz: The witness. Mr. Bucher asked him the question: "Do you know of any other damage that was done to that truck at that time, outside of that?"

The Court: What has the witness been doing in the meantime? Has that been gone into?

Mr. Scholz: Pardon.

The Court: All right, proceed.

Mr. Scholz (reading):

"A. That is all the damage that was done to the Army vehicle.

"Q. Here is another one."

Mr. Scholz: I think that one refers——

The Court: This is the rear end of the Dodge?

Mr. Scholz: Bumper.

"Mr. Bucher: A Dodge truck?

Mr. Scholz: Yes."

Yes, bumper. (Reading):

Q. (Mr. Bucher): When was that taken?

Mr. Scholz: Same date.

Mr. Bucher: Had this been repaired?

Mr. Scholz: I don't know.

Mr. Bucher: Well, go ahead with your testimony. [166]

Mr. Scholz: This was taken 7/15/47. I just want him to identify the picture.

Mr. Bucher: If that is all, why, I will have no objection.

Q. (Mr. Scholz): I show you a picture of a

(Deposition of R. L. Hammond.)

pick-up truck and ask if you can identify that truck.

A. Yes; that is the Dodge pick-up truck that cut in front of us.

“Q. You not the fender appears to be quite heavily damaged.

Mr. Bucher: Wait a minute. I object to that, now, Mr. Scholz, inasmuch as there is no evidence in the record, and I submit there will be no evidence to the effect that any damage shown on the truck in this picture occurred at the time of the accident in question, assuming that the picture was taken in July of 1947, because the evidences will also show the truck had been fully repaired before that time.

Mr. Scholz: Well, I agree with you. We can stipulate that any damage on that truck was not a result of the accident.

Mr. Bucher: Yes; if that is what you mean.

Mr. Scholz: Yes, that is the stipulation. That is what I wanted to bring out.

Mr. Bucher: All right.

Mr. Scholz: I will offer that in evidence as Defendant's Exhibit B. [167]

(The photograph of Dodge pick-up truck was marked Defendant's Exhibit B.)

Q. (Mr. Scholz): About how far from the intersection was the Army vehicle when this truck cut in front of the Army vehicle?

A. 30 feet.

Mr. Bucher: Off the record.

(Deposition of R. L. Hammond.)

(Discussion off the record by direction of counsel.)

Q. (Mr. Scholz): You mean by that when the other truck started to cut in front, or cut in front?

A. When he started cutting in front.

Q. When he started to cut in front. Where were you in this truck?

A. I was sitting in the back next to the cab facing east."

The Court: Just a minute. Where was he seated in the cab?

Mr. Scholz: He was in the cab facing east; in other words, your Honor, the truck was going this way (indicating) and he was in the cab facing this side (indicating).

The Court: Yes, yes. Proceed.

Mr. Scholz: (Continues reading):

"Q. Did you see the stop signal? A. Yes.

Q. How did you see that?

A. I was looking over the cab.

Q. Where was——" [168]

The Court: What was that last, just before that?

"Q. (By Mr. Scholz, reading): How did you see that?"——

The Court: Yes.

"A. (Mr. Scholz): I was looking over the cab."

The Court: Cab, c-a-b?

Mr. Scholz: That is right. That is the way he says it here.



(Deposition of R. L. Hammond.)

The Court: Looking over the cab?

Mr. Scholz: I know what he meant.

The Court: What do you think he meant? This is off the record, Mr. Reporter.

(Off the record discussion.)

The Court: All right, proceed.

“Q. (By Mr. Scholz, reading): Where was the pick-up truck, what was the location of the pick-up truck when the Army vehicle hit it?

A. It was kind of across the lane, sitting kind of crossways.

Q. You are referring to the two lanes on the east side of the tracks? A. Yes, east side.

Q. At the time you hit it it was kind of——

A. Across the lane.

Q. Across the line. Was most of it in the lane nearest to—— A. West side.

Q. Nearest to the street car track?

A. Yes.

Mr. Bucher: You say was most of the truck——

Mr. Scholz: Most of the pick-up truck nearest—— A. Yes.

Q. Was any part of the pick-up truck in the lane nearest to the curb? A. Yes.

Q. Do you recall about how much?

A. I would say it was one-third.

Q. One-third was in the second lane?

A. Yes.

Q. And two-thirds was in the first lane?

A. Yes.

Q. By the first lane I mean the lane nearest the track. A. The curb?

(Deposition of R. L. Hammond.)

Q. No.           A. The track, that is it.

Q. Is that correct?

A. Yes, that is it.

Q. When this pick-up truck cut in front of the Army vehicle was there any effort made to stop the Army vehicle more rapidly?

A. Yes. Sergeant Bailey, he threw the brake on as soon as he saw he was cutting in front of him.

Q. What happened to the truck that had stopped for the red light signal and that was in the lane nearest to the curb, do you know? [170]

A. Well, just as we hit this pick-up we knocked it ahead to the back of him, and as the light had changed for the go signal, so he just went off. Nobody ever did see him any more.

Q. You hit the pick-up truck and knocked him into the truck ahead of you?           A. Yes.

Q. Was that with much force, or how?

A. No, it didn't hit him very hard; just hardly bumped it."

Mr. Scholz: I presume we can correct and say "It didn't hit him very hard"?

Mr. Bucher: That is correct.

"A. (Mr. Scholz continues reading): No, it didn't hit him very hard; just hardly bumped it.

Q. This truck, then, that had stopped for the red light signal, just went right on?

A. Yes, he went on.

Q. Do you know who the driver of this pick-up truck was?

A. All I know, they called him Peter.

(Deposition of R. L. Hammond.)

Q. When the driver of the pick-up truck cut in front of the Army truck, did he give any signal that he was going to cut in?      A. No, sir.

Q. Did you see the truck as it cut in front of the Army vehicle? [171]      A. Yes.

Q. Immediately after the accident what happened?      A. Well, I hurt my finger.

Mr. Bucher: I ask that that be stricken. Let him tell what did happen.

Mr. Scholz: Yes, State what happened. What happened immediately after the collision?

A. Well——

Q. Just state exactly what happened, as near as you remember.

A. I had hurt my finger, this finger right here, knocked it off, so I got down and get over to get a bandage to bandage it up, and Mr.—Peter, he went and called a fellow to come to fill out an accident report for him.

Mr. Bucher: Mr. Who?      A. Peter.

Q. (Mr. Scholz): You mean the man that was known as Peter?      A. Yes.

Q. You heard his name, Peter?

A. Yes. He went to get someone to fill out an accident report for him. When I got back——

Q. When you got back?      A. Yes.

Q. Did you leave the scene of the accident?

A. Yes. [172]

Q. Where did you go?

A. There was a car parked over there and they saw my finger, and they had a Band-Aid in his car, and he called me over and I got it.

(Deposition of R. L. Hammond.)

Q. Do you know who that was?

A. No. So when I got back——

Q. No. Finish what you started to say.

A. Sergeant Bailey and Peter was there filling out the accident report. I went back to the back of the truck and motioned for traffic to come on around.

Q. Did the driver of the pick-up truck appear to be hurt?           A. No, sir, he didn't.

Q. Did he complain of any hurts?           A. No.

Q. Did he say anything?

A. Well, he was talking. He said, "Well, if you can——"

Mr. Bucher: Wait a minute. He asked you whether he did say anything? Answer that 'Yes' or 'No.'           A. Yes.

Q. (Mr. Scholz): What did he say?

Mr. Bucher: I object to that as not part of the res gestae. That was after you had gone over and got the Band-Aid and came back."

Mr. Bucher: I waive the objection, if the Court please.

The Court: All right. [173]

Mr. Scholz: (Continues reading)

"The Witness: Yes.

Mr. Bucher: Go ahead and answer it over my objection. I just want to reserve my objection.

A. Well, he said the Army would fix his truck for him.

Mr. Bucher: What?

A. The Army would fix his truck; the only

(Deposition of R. L. Hammond.)

thing, it would be tied up until they did fix it for transportation, and without his truck. That is about all he said. I went back there.

Mr. Bucher: I withdraw my objection now.

Mr. Scholz: Do you recall anything else that he said?       A. No, sir.

Q. I hand you herewith a picture and ask you if you can identify that.

A. Yes, that is Van Ness Avenue.

Q. Is that looking toward what street?

A. Bush.

Q. In other words, the intersection in the upper left-hand corner is Bush?       A. Yes.

Q. According to my notes, that was taken on July 15, 1947.

Mr. Scholz: I offer that in evidence as Defendant's Exhibit C.

Q. (Mr. Scholz): What happened next?

A. Well, the wrecker came and got his truck, pulled it on [174] away and we went on to camp.

Q. You stated that he went to fill out an accident report.

A. He called someone to come and fill it out for him.

Q. Who is 'he'?

A. Peter, to my knowledge.

Q. The man you had known as Peter, the driver of the pick-up truck?       A. Yes.

Q. Called somebody by telephone?

A. Yes.

Q. He went into a place and telephoned?

(Deposition of R. L. Hammond.)

A. Right on the corner of Bush and Van Ness, the building there, he walked in there and called.

Q. How do you know he called somebody there? Were you there?

A. I was out at the truck when he came back. That is what he said, he went and called a guy to fill out an accident report for him.

Q. Then what happened, if anything?

A. Well, I was back in the back, there, directing traffic, and they were up there talking; I don't know what they were saying or doing until the wrecking truck came and pulled his truck away.

Q. Then what happened?

A. And we went on into the Presidio, turned in the [175] accident report, and went up to see Captain Cline.

Mr. Scholz: That is all."

Mr. Bucher: Shall I proceed with the cross?

The Court: Yes.

Mr. Bucher: May I ask your Honor if you have before you the diagram that Sergeant Hammond made at the time? Because this is referred to in the cross-examination.

The Clerk: It is a yellow sheet, your Honor.

Mr. Bucher (reading): "Cross-Examination

"Q. (Mr. Bucher): How long have you been in the Army? A. I came in in 1943.

Q. That is when you enlisted? A. Yes.

Q. You have been in continuously ever since?

A. Yes.

Q. And are now? A. Yes.

(Deposition of R. L. Hammond.)

Q. Were you a corporal at the time of this accident?      A. No; Pfc.

Q. Private first class?      A. Yes.

Q. Where had you been that morning?

A. We had been down to Third and Townsend to pick up some groceries off a hospital train to take them back to the Presidio. [176]

Q. In the Army truck in which you were riding I assume there is a driver's seat crosswise with the body of the truck, in front, isn't there?

A. Yes.

Q. The driver, Bailey, was in that seat on the left-hand side?      A. Yes.

Q. Is that right?      A. Yes.

Q. You were sitting in the rear, to the rear of that seat, facing east?      A. Yes.

Q. Were you sitting on a seat?      A. Yes.

Q. Were you alone in the rear of the truck?

A. No; Sergeant Salazer was sitting right beside me.

Q. He was also facing east?      A. What?

Q. You stopped at Sutter and Van Ness because of the stop signal there, did you?

A. Yes.

Q. The signal was "Stop"      A. Yes.

Q. When you stopped at Sutter and Van Ness were there any other cars or trucks ahead of you at the "Stop" signal [177] in your lane?

A. Yes.

Q. How many?

A. Well, I couldn't say just how many there was, but there was some pulled off in front of us,

(Deposition of R. L. Hammond.)

and we pulled off and went up, but I didn't count them.

Q. Wait a minute.

A. I couldn't say just how many there was, but I know there was some. When we pulled off there was cars pulling off in front of us.

Q. You mean when you left the crossing on Sutter Street?      A. Yes.

Q. Would you say there were two cars ahead of you in line?

A. No, I couldn't say there was for sure; I didn't count them. I wasn't paying very much attention to it.

Q. You didn't pay any attention?      A. No.

Q. But as soon as the 'Go' signal at Sutter and Van Ness flashed green your truck immediately started forward toward Bush Street, didn't it?

A. Yes.

Q. When you approached the intersection of Bush and Van Ness you stopped for a red signal?

A. Yes.

Q. You are sure of that, now, are you?

A. Yes. [178]

Q. You don't know of your own knowledge whether those signals flash in unison, or not, do you—change in unison?      A. No, I don't.

Q. Now, what was the fastest speed you were making between Sutter and Bush?

A. 15 miles per hour.

Q. Did you see the speedometer?

A. No, but he never got it out of second gear,



(Deposition of R. L. Hammond.)

and that's about all one of those trucks will do in second gear.

Q. Then you are basing your answer on the fact the truck won't go over 15 miles an hour in second gear?

A. No, I won't say it wouldn't go over that. It will go over that in second, but that is about what he was running, 15 miles per hour.

Q. That is your guess?                      A. Yes.

Q. But you did not see the speedometer?

A. No.

Q. Did the driver of your truck proceed in a straight line with reference to Van Ness as you approached the intersection of Van Ness and Bush?

A. Yes.

Q. You were not on an angle either way?

A. No.

Q. Is that right? [179]                      A. Right.

Q. Now, Corporal, will you mark on that diagram the position of the safety zone at the corner of Bush and Van Ness?

(Witness marks on the diagram.)

Q. Will you do this: Will you mark with the letter 'S' the location of the safety zone, and would you draw a line therefrom and mark it 'S'? I think that is the best way.

Mr. Scholz: Yes; indicate what you mean—This is off the record.

Mr. Bucher: Yes.

(Discussion off the record by the direction of counsel.)

(Deposition of R. L. Hammond.)

Q. (Mr. Bucher): Draw a line there and mark it 'S'. The line you have drawn is pointed toward the safety zone; is that right? Is the safety zone in either of the two lanes that you have described on Van Ness Avenue?

A. It is in the west lane going north.

Q. Isn't it true that the lane next to the street car track on Bush Street verges to a point and connects with the east lane when it reached the safety zone? A. Yes.

Q. That's right. Now, will you locate on the diagram the exact position of the truck that was already stopped at the intersection, the first truck?

A. It was back a little further than that. [180]

Q. That is what I thought. You had it out there a little too far.

Mr. Scholz: Hadn't you better designate to which you refer?

Mr. Bucher: This is off the record. Now, over here will you write the words 'curb line'? Now, will you locate the diagram, on the diagram, I mean, the position of the Dodge pick-up truck at the time it came to rest when it stopped?

A. That is as it was stopped after the accident?

A. Yes, after the accident.

Mr. Scholz: May I point out to you—make your figures more or less in conformity to the diagram. Don't make a truck as big as a block.

Mr. Bucher: No.

Mr. Scholz: You won't have room.

The Witness: They were both setting on an angle.

(Deposition of R. L. Hammond.)

Q. (Mr. Bucher): Will you draw a line like this at the Dodge truck, and will you mark that 'D', showing Dodge truck?

(Witness marks on diagram.)

Now, will you also draw a line from the Army truck and mark that 'A' for Army truck. Which way is east on that map?

A. East would be to the right, right here, this would be [181] east.

Q. Did the Dodge truck pass you?

A. Yes.

Q. On which side?

A. On the east side.

Q. On the east side, which would be your right side, wouldn't it? A. Yes.

Q. You are sure of that? A. Yes.

Q. That is what you said in your direct examination, but nevertheless you are satisfied the Dodge truck was in that position as you have drawn it on the diagram after the accident?

A. After the accident.

Q. Corporal, you testified before the County Coroner in this case, didn't you? A. Yes.

Q. On the 23rd of January, 1947?

A. Yes.

Q. You were sworn by the coroner there to testify and answer questions? A. Yes.

Q. I will ask you if this question was asked you:

'Q. Which way were you facing?

A. I was facing to the side of the truck.' '' [182]

(Deposition of R. L. Hammond.)

I said to the witness, "That is correct?"

The answer was, "That's correct."

Then I quote again from the Coroner's inquest:

"Q. Well, could you see what happened in front of you?

A. I just looked over the cab and could see.

Q. And you saw his car pass you on which side?

A. On the left side. We were on the inside lane.

Q. Going north, and he passed on the left side of the Army truck? A. Yes.'

I will ask you if that is the testimony you gave before the Coroner.

Mr. Scholz: Let him answer.

Mr. Bucher: Just answer the question.

Mr. Scholz: No, he can answer the question——

The Witness: Well, I gave them a statement but they could have made it wrong. I also said we was on the west lane, the inside lane next to the safety zone all the way down.

Q. (Mr. Bucher): Which do you call the west lane?

A. The one next to the street car track.

Q. You call that the west lane?

A. Yes.

Q. Is that what you call the inside lane or outside lane? [183]

A. That is the one I would call the inside lane, was nearest the street car.

Q. Go ahead. Did you give this testimony before the Coroner as I read it?

(Deposition of R. L. Hammond.)

A. I wouldn't swear I gave it as you read it there; they could have put something else. They might have misunderstood me by the way I said it.

Q. Do you remember whether you did say that?

A. No, I do not.

Q. Well, if that was your testimony before the Coroner, would you now say that you were mistaken at that time in stating that it passed you on the left side?      A. Yes.

Q. You would say you were mistaken at that time?      A. Yes.

Q. Would you say your memory is any better now than it was at that time?      A. Yes.

Q. Is it?

A. Yes. At the time this accident happened I never gave it a thought that anything was ever going to come up about it, and just plumb forgot about it until about six months later I hear that he had died.

Q. But this testimony, Corporal, was given on the 23rd of January, which was one month after the accident; that is correct, isn't it? [184]

A. Yes.

Q. Corporal, at that time you were of the opinion that he passed on the left side?

Mr. Scholz: Just a minute. He didn't so state.

Mr. Bucher: No. I can cross-examine on that, though.

Mr. Scholz: But that is a misstatement of what he testified to. He did not testify that he was of that opinion. He testified that they may have made

(Deposition of R. L. Hammond.)

a mistake at the time or he may have made a misstatement that they passed him on the——

The Witness: Right-hand side, east.

Mr. Scholz: On the east side.

Mr. Bucher: Mr. Scholz, I think you will agree with me that the usual procedure is for you to make your objection and then if your objection is sustained the answer can be ruled out, but I think he should answer the question.

Mr. Scholz: Yes, but I don't think you can say he stated this or that when he didn't state that.

Q. (Mr. Bucher): You did state that you saw the car pass you on the left side; isn't that true?

Mr. Scholz: I make the objection to that on the ground that he did not state in his testimony today.

Mr. Bucher: No, but I mean——

Mr. Scholz: And on the ground that he stated that he [185] didn't remember what he testified before the Coroner's Inquest."

The Court: Well, is there a formal objection in there, or what is it? Is it merely a running objection?

Mr. Scholz: It is not a formal.

The Court: All right.

Mr. Bucher (reading):

"Q. (Mr. Bucher): You have no recollection of what you testified to before the Coroner: is that correct?

A. I couldn't tell you what I told him over there.

Q. Do you know whether what you told them at that time was true?      A. I couldn't say.

(Deposition of R. L. Hammond.)

Q. You don't know. Well, do you know definitely that what you are testifying to today is true? A. Yes.

Q. But you don't know whether it was true at that time. Did you examine the Dodge truck, pick-up truck, in the front after the accident?

A. I just walked around it, is all.

Q. But you saw how badly it was damaged, didn't you? A. Yes.

Q. What part of the front of the Dodge truck was damaged?

A. The grille was pushed back in.

Q. The middle of the grille, wasn't it? [186]

A. Yes.

Q. Was pushed back? A. Yes.

Q. Was that true? A. Yes.

Q. Isn't it also true that the center of the rear of the Dodge truck was pushed in?

A. Yes, the center could have been damaged; we hit it about right on the corner, the left rear, not quite center, but it could have bent—the center could have been pressed in.

Q. Isn't it true that the Army truck hit the Dodge truck right in the very center of the rear?

A. No.

Q. You are positive of that?

A. I am sure, for if we would hit him in the center our front bumper would be hurt, for one reason.

Q. Is that the reason you answer the question in that manner?

(Deposition of R. L. Hammond.)

A. No, that is not the reason.

Q. Do you know whether the right side or right rear part of the Dodge truck was damaged at all?

A. No, sir, it was not, to my knowledge.

Q. You are sure of that?           A. Yes.

Q. When the Dodge truck cut over in front of the Army truck [187] did he continue in that same direction until he was hit?           A. Yes.

Q. Did the driver of the Dodge truck after he cut in front of you on an angle turn back to the other angle?

A. As he cut in front of us he was so close on to this other truck, as he snapped on the brake and the time we hit him, it knocked him on an angle.

Q. You knocked him——

A. We knocked his truck at an angle; he never did get clean in the lane we was driving in.

Q. You knocked him then in what angle? Come here.

Mr. Scholz: How will we have a record of that.

Mr. Bucher: If he will draw it we will.

The Witness: You want me to draw you an angle of how he was setting after the accident; is that right?

Mr. Bucher: Yes; the Dodge truck only now.

A. I will start at the rear of it. Setting something about like that.

Q. Then you struck him on the left rear end, did you?           A. Yes.



(Deposition of R. L. Hammond.)

Q. And he was then on an angle looking toward the northwest, wasn't he? A. Yes.

Q. And after you hit him you mean to say that the position of his truck changed so he was then resting at an angle [188] and looking toward the northeast? A. Yes.

Q. Sure of that? A. Yes.

Q. Did he hit the truck ahead of him before you struck the Dodge pick-up? Did the driver of the Dodge pick-up hit the car ahead of him before you struck the Dodge?

A. Not to my knowledge, no.

Q. Then is it your opinion that you struck the Dodge car and forced him into striking the car ahead of him? A. Yes.

Q. That is right? A. Yes.

Q. You are positive now that the Dodge truck changed its position and you say he had not come to a stop there? A. No.

Q. He was still moving? A. Still moving.

Q. You struck him on the left corner and he changed his position so he then faced toward the northeast? A. Yes.

Q. Sure of that?

A. Yes. Just like the book setting there. You can take that book and hit it over there and see it facing that was (indicating). [189]

Q. Will you mark this white slip with your name? You did not offer that in evidence, did you?

Mr. Scholz: If you wish to offer that in evidence as Plaintiffs' Exhibit No. 1, yourself, and the other as Plaintiffs' Exhibit 2.

(Deposition of R. L. Hammond.)

Mr. Bucher: That is what I am going to do. We offer that in evidence as Plaintiffs' Exhibit No. 1.

"Q. Will you also sign this yellow sheet?

We offer the yellow sheet as Plaintiffs' Exhibit 2.

(The pencil diagram on white paper was marked Plaintiffs' Exhibit 1; the pencil diagram on the yellow paper was marked Plaintiffs' Exhibit 2.)

Q. (Mr. Bucher): You may have answered this question, Corporal, but if you have I have forgotten. What was the highest speed you made between Sutter and Bush Streets?

A. Approximately 15 miles an hour.

Q. Oh, I remember that you said that.

Were you talking to the other soldier during that time before the accident? A. Yes

Q. You weren't paying much attention to the traffic, were you? A. Not too much, no.

Q. Were there any people in the safety zone at that time, do you know?

A. I am not sure, but as I remember I think there were. [190]

Q. There were?

A. I wouldn't say for sure. I wouldn't swear to it. To the best of my recollection I saw somebody.

Q. If what you say is correct, when the Dodge truck attempted to cut in front of you going in a northwesterly direction—that's right, isn't it?

(Deposition of R. L. Hammond.)

A. Yes.

Q. It was then going toward the safety zone, wasn't it?      A. Yes.

Q. Do you know whether it had reached the safety zone, whether any part of the truck was in the safety zone before you struck it?

A. No, it was not in the safety zone. It never did get that far over the line.

Q. You are positive also that when you came to rest after the accident your truck was in the inside lane next to the street car tracks; is that right?

A. It was setting on kind of an angle.

Q. Your truck was at an angle?

A. Yes, our truck was at an angle, too.

Q. Which direction was your truck pointing, northwest or northeast?

A. Ours was pointing northeast.

Mr. Scholz: At what time was this?

The Witness: 9:30 in the morning. [191]

Mr. Scholz: No.

The Witness: Oh, that is after the accident.

Mr. Bucher: When he came to rest.

A. After it all happened?

Q. Then the driver of the Army truck turned his truck toward the northeast, is that right, just before you struck?

A. I couldn't say about that for you can be driving along and apply your brake and sometimes your car will automatically turn this way and one brake will catch before the other.

(Deposition of R. L. Hammond.)

Q. You are also positive about the third truck; by that I mean the first truck in line up at the stop signal was in the outside or the east lane; is that right?      A. Yes.

Q. How much of your truck, the Army truck, would you say was in the east lane after the accident?

A. Just a little of the front of it. About, I would say——

Q. 10 per cent of it?

Mr. Scholz: Let him answer.

Mr. Bucher: Well, I am asking.

The Witness: About one-third of the front.

Q. (Mr. Bucher): About one-third of the front?      A. Yes.

Q. In other words, just about the wheels?

A. Just about the wheel part of it—about like from here [192] over there, was setting there.

Q. Corporal Hammond, since the testimony before the Coroner in this case, have you discussed this case with anyone?

A. Two FBI's came out to see me and it hasn't been too long ago, and I talked with them, and Mr. Scholz came out and discussed it.

Q. When you discussed the matter with the FBI agents did they tell you their opinion as to the position of the three trucks?      A. No.

Q. Did you tell them at that time that the Dodge truck passed you on the left side?

A. No. I told them it passed me on the right side.

(Deposition of R. L. Hammond.)

Q. You did?

A. Yes. Also they had a diagram drawn up on this truck that was supposed to be—that was sitting at Bush, the stop signal there, in the other lane, and they made a misstatement, and I called it to their attention, and they were talking to me, and they put it in the east lane in place of the west lane.

Q. Now, if it should appear from the testimony of any witness that the three trucks after the accident were all in the same lane, and all in the inside lane next to the street car track, you would say that that was a mistake and that is not true, wouldn't you? [193]

A. Yes.

Mr. Scholz: I object on the ground it is argumentative."

The Court: Is that objection pressed?

Mr. Scholz: Yes, it is objectionable, your Honor.

The Court: I will sustain the objection.

Mr. Bucher (reading): "Q. (Mr. Bucher): How fast was the Dodge truck going, in your opinion, when it cut over in front of you?

A. I would say 20 miles an hour.

Q. 20 miles an hour? A. Yes.

Q. Of course, you don't know whether he was going to go up Bush Street, or not, do you?

A. No. I don't know what he had in mind to do.

Q. You don't know whether the driver of the Dodge pick-up truck was in second gear or not, do you? A. No, sir, I do not.

Q. But the driver of your car was?

A. Yes.

(Deposition of R. L. Hammond.)

Q. When did he get into second gear?

A. Just as it left from Sutter and Van Ness he pulled in low gear and threw it in second gear and kept it in second on up to there.

Q. Have you talked this case over with Sergeant Salazer recently? [194]

A. No, I haven't saw him. He left right after the accident and went to a camp in New Jersey, and from there overseas.

Q. Have you seen Mr. Bailey since the accident?

A. No. He was discharged right after that, and I haven't saw him since.

Q. Not since the accident involved in this case?

A. That's right.

Mr. Bucher: I think that is all."

Mr. Bucher: I think that is all. Thank you, your Honor.

Mr. Scholz: I will read the redirect, if your Honor please.

(Reading): "Redirect Examination

"Q. (Mr. Scholz): Corporal, you stated that the Dodge pick-up truck, the truck that cut in front of the Army vehicle, was still moving when the Army vehicle hit it?

A. To my knowledge, yes.

Q. Did the Dodge pick-up truck hit the car ahead of it with much force?

A. Not very much, no.

Mr. Bucher: I object to that as calling for an opinion and conclusion of the witness."

The Court: Overruled.

(Deposition of R. L. Hammond.)

Mr. Scholz (reading):

“Q. (Mr. Scholz): Do you know?

A. I couldn't say. I know it hit it, but not too hard, it didn't seem to me. I didn't get very much of a jar [195] and I was sitting in the back.

Q. The truck which had stopped for the stop signal, and which the Dodge pick-up hit, did it go right off without stopping? A. Yes.

Q. After the signal changed? A. Yes.

Q. The driver didn't get out, did he?

A. No.

Q. Do you know what I mean by 'drawn to scale,' a map drawn to scale? A. Yes.

Q. These plaintiffs' exhibits, 1 and 2, this is not drawn to scale, is it? A. No.

A. And the size of the trucks are not drawn to scale, are they? A. No.

Q. And the position of the trucks on Plaintiffs' Exhibit No. 1 on this white paper which you have designated as D and A are the position of the trucks after the accident?

A. After the accident, yes.

Q. You testified, I believe, that the front part of the Army vehicle that was over the white line separating the lane between the curb line and the street car track was just the wheel? [196]

A. Yes, just the right front wheel.

Q. How much of the right front of the truck was over that line?

Mr. Bucher: You mean the Dodge truck?

Mr. Scholz: Of the Dodge truck, that's right.

(Deposition of R. L. Hammond.)

A. The right front?

Q. Yes.

A. I would say it was approximately one-third of it, of the front.

Q. Of the front?           A. Yes.

Q. You mean about the wheel?           A. Yes.

Q. Or more?

A. Just a little more than the wheel. I will show you on here.

Q. All right; referring to Defendant's Exhibit A, you have indicated on there a spot showing the right front wheel and a few inches of the dashboard.           A. Yes, the bumper.

Q. How many inches of the dashboard would you say?           A. Two feet.

Q. That was a part of the Dodge pick-up which was resting over the curb line at the time after the accident?           A. Yes. [197]

Q. By 'over the curb line,' I mean over the line separating the two lanes.           A. Yes.

Q. Where was the rear of the Dodge pick-up truck, was that all in the lane nearest to the street car track, or was any part of that over that line and in the lane nearest to the curb?

A. To my knowledge, the right rear wheel of the Dodge was sitting about two inches on the east side of the line.

Mr. Scholz: 'That is all.'

Mr. Bucher: The recross-examination is very brief, your Honor (reading):



(Deposition of R. L. Hammond.)

Recross-Examination

“Q. (Mr. Bucher): The only way that you can tell what part of the Army truck struck the Dodge truck is by the mark on the front fender of the Army truck; isn't that true? A. Yes.

Q. In other words, when you got out of the vehicle you saw a mark on the front bumper; isn't that true? A. Yes.

Q. And you judged from that mark that that was the part that struck the Dodge; is that right?

A. Yes.

Q. But you don't know whether that mark was there before, [198] or not, do you?

A. I know it was not there before.

Q. Had you examined the Army truck before?

A. Yes. I had rode it every day for quite some time.

Q. Well, how long?

A. Approximately two months.

Q. You know that that mark was not there before? A. Yes.

Q. Sure of that? A. Yes.

Mr. Bucher: That is all.

Mr. Scholz: That is all.”

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Mr. Bucher: And that completes the reading of the deposition.

The Court: Is there a photograph in evidence? Do you have the depositions in evidence respectively?

Mr. Scholz: Yes, your Honor.

Mr. Bucher: Yes, your Honor.

The Court: It may be admitted in evidence. Do you have a photograph of the Army truck in the over-all sense?

Mr. Bucher: We have not.

The Court: Can you agree upon a stipulation as to the form of the truck, itself? Otherwise I will require a photograph.

Mr. Bucher: As to the type of body? I think we can. [199]

The Court: All right, we will take a recess, and in the meantime you can agree on that.

Mr. Bucher: I might remind your Honor that Mr. Scholz was to identify those medical reports.

The Court: If you have a photograph of the over-all picture, I notice in the deposition that only the fore part of the truck is taken, Exhibit A.

Mr. Scholz: I could procure a picture, if your Honor wishes.

The Court: Exhibit A in the deposition of Roy Hammond, it appears that the fore part of the truck is represented, not the body structure, itself. It shows just the fore part, including the hood, the fender, the two front wheels, but excludes the body structure, proper.

Mr. Bucher: We can procure one, depicting the truck at that time.

The Court: Depicting the truck at that time, you say?

Mr. Bucher: Yes, your Honor.

The Court: Very well, we will take a short recess.

(Recess.)

Mr. Bucher: If the Court please, counsel for the defense and I, with your Honor's permission, have agreed that we will obtain photographs of the Army truck in different positions, showing the entire truck, which is now available, and at the Presidio, I believe. [200]

Mr. Scholz: That is right.

Mr. Bucher: And we will submit them in evidence to your Honor.

Mr. Scholz: If your Honor please, we will rest, although I understand you want—it is stipulated that, subject to the approval of your Honor, of course, that we may be able to secure the testimony of Roy Lee Hammond before the Coroner's Inquest, and that may be read into the record, if that is agreeable to your Honor.

The Court: What is the purpose?

Mr. Bucher: For impeachment purposes solely.

Mr. Scholz: And then also the testimony of Harry Failor. Do you want to——

Mr. Bucher: Well, I guess you are still on the defense, are you not?

The Court: One moment. Do you stipulate, Counsel, that the testimony of Roy Lee Hammond, given before the Coroner's Jury and Inquest, having been taken in the City and County on the date mentioned, be read into the record on this trial?

Mr. Bucher: Yes, your Honor.

The Court: The whole testimony before the Coroner?

Mr. Bucher: No, the testimony of Roy Hammond.

The Court: Yes.

Mr. Bucher: That is all we want.

The Court: Well, you did undertake to impeach him [201] specifically on the subject-matter of the testimony before the Coroner, did you not?

Mr. Bucher: Yes, we did, your Honor.

The Court: And you pointed out to him specifically the testimony you had in mind?

Mr. Bucher: Yes, your Honor.

The Court: And made it appropriate?

Mr. Bucher: Yes, your Honor.

The Court: Now, this wholesale showing, burdening the record with the whole testimony of Hammond before the Coroner's inquest, is rather unusual.

Mr. Bucher: It was the only way.

The Court: I find no basis for it. What is your basis for that procedure.

Mr. Bucher: May I express myself to the Court in this position?

The Court: Yes.

Mr. Bucher: The only way, or the proper way for us to complete the impeachment of the witness is to call the reporter who heard his testimony before the coroner and who could testify as to it.

The Court: He has already admitted that he

made those statements and gave that certain testimony before the coroner.

Mr. Bucher: Very well.

The Court: He has admitted that. What purpose is going [202] to be served by this?

Mr. Bucher: Well, I will withdraw my request.

The Court: Well, that rule prevailed years ago, when we had to call in the reporter and demonstrate that the reporter took notes. But these records are official records now.

Mr. Bucher: That is true.

The Court: You see, what purpose will be served by it, I am not going to foreclose it, but I don't see the purpose of it. Do you understand? Are you sure I understand your inquiry, or am I just answering myself?

Mr. Bucher: No, you are answering my inquiry, your Honor.

The Court: You laid the foundation, you directed his attention to the testimony, and he answered as he did answer.

Mr. Bucher: Very well.

The Court: Now, Mr. Scholz?

Mr. Scholz: I think that is more or less correct, your Honor. I concur with you. I thought it would not be admissible, but I had no objection. Any evidence your Honor wanted to hear was perfectly agreeable with me.

The Court: I am willing to hear it.

Mr. Scholz: I think your Honor is right, but as I say I have no objection to it. I think we will

close, except that we will have those photographs taken, and I will have a copy made of the report referred to, the medical reports—the pathological and so on. They will be submitted to the Court. [204] Do you want to offer that in evidence, the diagram there?

Mr. Bucher: Which diagram?

Mr. Scholz: That one, there (indicating).

Mr. Bucher: Well, I think the diagram showing the positions as related possibly should go in with the other exhibit, if the Court please.

The Court: Well, it has been marked in evidence, has it?

The Clerk: It has not, your Honor.

The Court: It should be marked.

Mr. Scholz: It has not yet been offered in evidence. It should be marked. Have it marked appropriately as Plaintiffs' Exhibit, or defendant's, as it may appear.

Mr. Bucher: We offered it originally, so it may be marked as our exhibit.

The Clerk: Marked Plaintiffs' 4 in evidence.

(Diagram referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 4.)

The Court: Now, a stipulation was entered into with respect to certain factual matters. I think that stipulation should be read into the record. Otherwise it will not be reflected in the official record.

Mr. Bucher: In that case, I think it should be

read. With the Court's permission, I will read the stipulation entered into between the parties, omitting the caption. (Reading.)

"It is hereby stipulated by and between the parties [204] hereto that the following statements may be accepted as true without affirmative proof, and may be considered as evidence in the trial of the above action:

"1. That at the time of the accident sued upon in this cause, Peter Fotopulos was driving the Dodge pickup truck involved in the accident.

"2. That he was then of the age of 49 years, and his life expectancy on December 23, 1946, was 23.36 years.

"3. That he was married to the plaintiff and guardian ad litem on November 24, 1935.

"4. That he left surviving him his widow, aged 29 years, and two children, Thomas F. Fotopulos, aged 10 years, and *John F.* Fotopulos, aged 9 years.

"5. That Peter Fotopulos died on January 10, 1947.

"6. That Peter Fotopulos, at the time of the accident sued upon herein, was the sole owner of the business known as the 'P. F. Casing Company.'

"7. That the net earnings of Peter Fotopulos upon which he paid Federal income taxes were as follows: For the year 1943, \$7872.55. For the year 1945, \$15,195.92. For the year 1946, \$18,574.76.

"8. That plaintiff, who is the widow of Peter Fotopulos, has no property or income separate and apart from her community interest."

Mr. Scholz: We rest, your Honor. [205]

(Defendant rests.)

The Court: I would like to ask the plaintiff, the widow, several questions.

MRS. DIAMOND FOTOPULOS,

recalled, having been previously sworn, testified as follows:

The Court: You have been sworn heretofore. You may be seated. May I ask you these questions:

Q. How long had your deceased husband been engaged in the particular business that has been referred to? A. Oh, over 20 years.

Q. In the casing business?

A. Yes, over 20 years.

Q. And when you married him, he was engaged in that business? A. Yes.

Q. And did he employ men in the course of the manufacture of the casings?

A. He did, one.

Q. One man?

A. Not all the time, just when he needed help. Mostly he employed a woman to do his, making the casings.

Q. Where was the factory located?

A. 1131 Shafter Avenue.

Q. San Bruno? A. No, San Francisco.

Q. San Francisco? A. Yes, sir.

Q. I see.

Mr. Bucher: May I interrupt, if your Honor please? I think that should be South San Francisco.



(Testimony of Mrs. Diamond Fotopulos.)

The Witness: No, San Francisco.

Mr. Bucher: I was mistaken.

The Court: Q. I would like to know, did that consist of a regular factory, or was it just a loft? Tell me about it in your own words.

A. Well, we would make sausage casings.

Q. I know, was it a big building, a little building? Did you rent it, or did you own it?

A. Yes, we owned it. I own it now.

Q. And was it located—

A. At 1131 Shafter Avenue, in San Francisco.

Q. You worked with your husband, did you?

A. Yes.

Q. In the manufacture of these casings?

A. No.

Q. What did you do?

A. Just once in a while I helped him, if he would have to leave, to go out, I would take telephone calls.

Q. He undertook to make the deliveries?

A. Yes. He delivered the casings, clean the casings. [207]

Q. These earnings in 1943, did you keep the books?

A. No, we had an accountant keep the books.

Q. I noticed the earnings in 1943 were \$7000, while he earned up to \$15,000 the following years. How do you account for that?

A. Well, business was good.

Q. Business was better? A. Yes.

Q. And then it increased?

(Testimony of Mrs. Diamond Fotopulos.)

A. Oh, he had a partner then.

Q. When?

A. When was that? 1945, I think.

The Court: Will you read that again, Counsel? There was quite a disparity between the 1943 income, with \$7000, and then the one which went up to \$15,000. Now, that stipulation does not reflect any mean average earnings to me.

Mr. Bucher: No, but may I call the Court's attention to this fact, that the year 1944 is lacking. We have no report for that.

The Court: Yes.

Mr. Bucher: I talked to the tax collector's office about that. There was an income tax return filed, undoubtedly, but I talked with the accountant who made it up for Mr. Fotopulos during these years, and he advised me that he had no copy of the return made for the year 1944. I don't know whether Mr. Scholz has obtained that year, or not, but the accountant did [208] verify the other two or three years. In other words, 1943 was \$7800, and 1945 was \$15,000. There were two years elapsed in there.

Mr. Scholz: If your Honor please, in checking the income, I received a photostatic copy of the report for the year 1944. If it will be of any assistance to the Court, I would like to offer that in evidence.

Mr. Bucher: What does it show, Mr. Scholz?

Mr. Scholz: It shows—

The Court: Was this a joint return, or an

(Testimony of Mrs. Diamond Fotopulos.)

individual return, or what? Who was it filed by, was it a co-partnership return?

Mr. Scholz: The name is Peter—and there is something scratched out. It says Fotopulos.

The Court: Yes.

Mr. Scholz: And the address is 209 California Avenue, South San Francisco. The amount shown on it is \$12,460 for the year 1944. In other words, it went from \$8000 to \$12,000, from \$12,000 to \$15,000, then from \$15,000 to \$18,000.

Mr. Bucher: That is the only method we had. I expected to call the accountant, but after discussing the matter, in order to expedite this trial, we decided against it.

The Court: Well, the question of expedition is not of paramount importance to me. The question of getting facts is more important. [209]

Mr. Bucher: I appreciate that.

The Court: I am not interested in expedition as such.

Mr. Bucher: Mrs. Fotopulos advised me in the beginning that she knew nothing about the books of the company, as I say, and all of the books were audited by an accountant; he was and is available.

Mr. Scholz: This may assist the Court. I didn't offer it in evidence because I was not sure whether it was admissible, but I may say that it is a photostat of the original. I might say this aside to the Court: The report which I have states that this business was being carried on in a medium-sized frame building with very little equipment, other

(Testimony of Mrs. Diamond Fotopulos.)

than one machine to clean the casings, and a number of flat tables, where the casings are sorted and packaged. It is observed that the casings were kept in salt, which would apparently account for the brine being on the bottom of the truck. That is the report of the FBI, which is all I know.

The Court: Well, Mr. Bucher, do you care to examine the lady further on this subject? That is, as to the general purport of my original inquiry? Do you know what that is all about?

Mr. Bucher: May I ask, with the permission of the Court—

Q. Mrs. Fotopulos, prior to your husband's death, you and your husband owned certain properties, didn't you, besides the property where the casing business was maintained? [210]

A. Yes.

Q. Now, what did that other property consist of that you owned?

A. Well, it was a two-story flat in South San Francisco, and the home we live in now. It is a private home. And in San Francisco here where I live now is a two-story flat.

Q. Now, you owned your own home in South San Francisco where you resided, is that correct?

A. Yes.

Q. Then you owned a two-flat building in South San Francisco?

A. Yes.

Q. That was rented out?

A. Yes.

Q. And what was the rental that you received from that location?

(Testimony of Mrs. Diamond Fotopulos.)

A. Fifty-seven fifty for the two flats together.

Q. For the two flats together? A. Yes.

Q. That was unfurnished? A. Yes.

Q. And you still own that, do you not?

A. Yes.

Q. Now, the flats in San Francisco that you own, was that a two-flat building?

A. Yes, it is rented by one person. He has a cleaning business downstairs and he lives upstairs.

Q. And what does that rent for?

A. Eighty-five.

Q. Eighty-five? A. Yes.

Q. Then your returns from the real estate that you own amount to, roughly, around \$400 a month, is that right?

A. Well, I guess about that much.

Q. And did you, or your husband, have any other income except the income from the sausage business? A. No, that is all.

Q. That is all of the income that you had?

A. Yes.

Q. Now, during the year 1944, I believe you stated to the Court that your husband had a partner? A. Yes.

Q. 1943 was that, or was it 1944?

A. I don't remember exactly.

Q. Who was the partner?

A. Arthur Bianchi.

Q. And how long had they been in partnership?

A. Oh, I think it was in 1936 when they started together.

(Testimony of Mrs. Diamond Fotopulos.)

Q. From the time they started? A. Yes.

Q. Well, then, did your husband buy out his partner's interest? A. Yes, he did. [212]

Q. When was that, do you know?

A. I don't remember exactly.

Q. You don't know what year it was?

A. No.

Q. Do you know how long it was before his death? A. Oh, about two or three years.

Q. About two or three years. And he bought his partner's interest out and then from then on he owned the entire business, is that true?

A. Yes, that is true. [212-a]

Q. Now, Mrs. Fotopulos, during the year prior to your husband's death, as I understand your testimony, he operated the business himself with a helper and then one employee? A. Yes.

Q. And you say sometimes you answered the telephone in the office?

A. Yes, that wasn't often, though—just when he had to go out and didn't have anyone left in the shop.

Q. Now, did he go out and take the orders for the casings? A. Yes.

Q. And he made deliveries of the casings?

A. Yes.

Q. And who did the processing or the cleaning of the casings? A. He did.

Q. Did his helper assist in that?

A. His helper just selected them.

Q. Just what?

(Testimony of Mrs. Diamond Fotopulos.)

A. Selected the casings in the different sizes. There were different sizes and they salt them and bunch them.

Q. And he sorted them—is that what you mean by selecting?

A. Yes, it was a lady that usually did that.

Q. Oh, it was a lady, this employee?

A. Yes.

Mr. Bucher: That is all, if the Court please.

The Court: Q. You were married when and where? [213] A. San Francisco, 1935.

Q. In 1935? A. November 24.

Q. And your husband then was engaged in the same business? A. Yes.

The Court: That is all I wanted to know.

Mr. Bucher: That is all.

Do you rest?

Mr. Scholz: We rest.

The Court: Do you have any questions, Mr. Scholz?

Mr. Scholz: No, your Honor. I haven't any.

The Court: Do you desire to discuss the matter, gentlemen, or submit it?

Mr. Bucher: If the Court please, my admiration for this Court and my conviction that your Honor's ability to analyze this testimony and weigh the evidence, render a fair decision, far exceed any effort I might make. With the Court's permission, we submit the case, unless the Court desires an argument.

The Court: I would desire, without indicating on the part of the Court—I am directing my remarks to you also, Counsel.

Mr. Scholz: Yes, your Honor.

The Court: My view in the matter is that I would desire to have the photograph of the truck, depicting the truck as it was at the time of the accident. I would like some thought given by respective counsel to the matter of damages in this [214] case.

Mr. Bucher: With the Court's permission, may we then submit, by stipulation, pictures, photographs of the truck, and may counsel confer on the matter of damages, and then again confer with your Honor?

The Court: Mr. Scholz, I think that is probably the more expeditious way to handle it. Unless, of course, you desire to discuss the facts orally.

Mr. Scholz: Mr. Bucher has put my own ideas much better than I could. I think our view would be that your Honor can weigh this evidence very competently. I don't think there is any particular question of law involved. If there is, I think that on the question of law it would probably be better to brief it, but I don't see any question of law.

The Court: No, there isn't any question of law.

Mr. Scholz: And on the question of damages, of course, I think it is completely discretionary with the Court, in his own judgment, in case the Court should award a verdict for the plaintiff. But I do think your Honor should have those pictures, and we will stipulate that we will furnish your Honor



with the pictures, and I believe that the medical testimony should be offered in, too, as long as your Honor suggested it. Then the matter could be submitted, unless your Honor desires us to brief any particular point. If your Honor desires that, we can do it. [215]

Mr. Bucher: Well, Mr. Scholz, I think you will agree with me that acting on the Court's discussion, we should at least discuss the measure of the damages.

Mr. Scholz: Well, it is a difficult question for me to discuss, because, frankly, I don't know.

Mr. Bucher: That is a matter of routine at this time.

Mr. Scholz: I will be glad to discuss it, but I just don't know how far I could go, because it is quite a question.

The Court: Mr. Bucher, do you desire to submit any actuarial testimony in this case?

Mr. Bucher: In view of the stipulation as to the life expectancy—I might mention that it came about in this way: I first communicated with Mr. Scholz, in the nature of a pretrial conference, you might say, to avoid calling unnecessary witnesses. I told Mr. Scholz I would communicate with the actuaries in San Francisco, which I did. When I first communicated with them, I was mistaken as to the age, I gave the age as 48, and I communicated the life expectancy on that to Mr. Scholz. Then we found that the age should have been 49, which reduced the life expectancy about a year and a half. After that was done, we agreed upon the

life expectancy, which was stipulated to. We believe, therefore, that would obviate the necessity of calling an actuary. That was, of course, upon the assumption, as the testimony showed, that the deceased was in normal health at the time of the accident. [216]

Mr. Scholz: I don't think my stipulation went that far that he was in normal health at the time of the accident.

Mr. Bucher: I said the evidence showed that.

The Court: Well, there isn't any evidence in the record to the contrary.

Mr. Bucher: That is true. That is what I meant to say. It is assumed. Dr. Wirthheim testified, I believe, that from all of his evidence, the man was in normal health, and so did Dr. Ryan.

The Court: I would suggest, then, will you make the transcript available for me?

Mr. Bucher: I beg pardon?

The Court: Will this transcript be made available for me, has it been written up at all?

Mr. Scholz: I do not think it has been written up, your Honor. I think it would be a good idea if we can make the transcript available to the Court.

The Court: I am not inclined to burden either side with the expense. I have the facts pretty well in mind. I am just awaiting the photographs.

Mr. Bucher: I don't want to demur on the question of expenses.

The Court: No.

Mr. Bucher: At the same time, we have been

under heavy expenses here in this case right along, with a counsel in [217] Boston and witness fees and so forth. I have no idea what the cost would be, but I don't like to speak for the record on it.

The Court: No, and I am not instructing you to.

Mr. Scholz: Well, then, if your Honor please, if you wish, I may direct a letter to the Attorney General and we might authorize the expense of that. I don't know for sure.

The Court: I think it unnecessary. I have the facts pretty well in mind. I would like to have you provide me presently with a general idea of the nature of the truck's structure. Do you know how it is constructed?

Mr. Bucher: You mean the Army truck?

The Court: Yes, as to the visibility and so on. I am particularly concerned about the testimony of this witness, the last witness. He claims he saw the turn made by the car, when he was sitting facing east, as he claimed.

Mr. Scholz: Well, if your Honor please, I have ridden in many 6x6 trucks.

The Court: What?

Mr. Scholz: I have ridden in many 6x6 trucks. They are what we call "weapons carriers," too. I know you have a wide range of vision, unless everything is closed up.

The Court: Well, is there any way we can determine as to whether on the day in question, the side gates were down or up?

Mr. Scholz: I think Hammond could testify to

that, and perhaps Captain Jenkins could testify to it. That is about all. [218]

The Court: The testimony given by both the driver and the passenger is very unimpressive to this Court. I don't know that I need to go further, above and beyond the matter with respect to the negligence in this case. The testimony of the plaintiff showed that, by two distinct witnesses, that at the time and place in question there was a crash, the nature of which was of sufficient severity to attract their attention while seated at a desk in an adjacent building. They came out and found the cars in the position as indicated on the board. The impact was of sufficient intensity to cause the pickup truck to separate in the center. That, in turn, was the resultant, no doubt, from the erosion process of the acid, I assume, on the body of the truck. But the impact was grave, and of sufficient force to cause the rear end of the truck to be demolished, as indicated by the repairman. The Army truck was immediately in the rear of the deceased's truck. I believe, from a fair view of the evidence, that the driver of the Army truck was paying little or no attention to the stop signal, and he so testified. The occupant, Hammond, contradicts the driver in the very essential and prime particular. He stated that the driver was slowing his speed in order to meet the stop signal. I am satisfied that the driver was more interested in exculpating himself from any liability than he was in telling the absolute truth about this accident. I am satisfied that the deceased was where he should be

at the time and place in question, [219] and that the impact was of sufficient severity to cause his **truck** to cross the line, the property line or pedestrian line, and crash into the truck in front of him. The stop signal then indicated "Go," the truck in front proceeded on its way.

I therefore account for the damage done to the radiator of the truck driven by the deceased. As I say, Hammond's testimony is very unconvincing. Cross examination developed that it is at variance with the driver on essential particulars. The driver himself, immediately after the accident, in the presence of others, stated that the Army would repair the truck. Apart from that, we have the uncontradicted testimony of a disinterested witness, McNeil, who testified that the driver of the Army truck stated that he couldn't stop, or he couldn't apply his brakes, or something like that.

A significant factor in the whole case, as I view it, is the stop signal, and this Court has driven that particular area many, many times. It is perfectly apparent to the Court, and was at the time this accident took place, that that stop signal was perfectly visible, at least a block away. The driver's testimony that he could not see it, that it was screened by a street lamp, is not in accord with the facts.

Now, with respect to the casual connection between the immediate injury and the death of the deceased, there is no question in my mind but what the impact of the steering wheel upon the deceased at the time in question was traumatic, and [220]

that he suffered from that blow. He told his wife upon returning home that he felt the pain. There was shock, he could not eat. Dr. Ryan's testimony—after all, Dr. Ryan performed the operation, and made what I regard a rather heroic effort, in view of the prior medical advice given to the deceased, to save him. Dr. Ryan, in my opinion, is best able to testify with respect to what he found and what he saw, rather than the glittering generalities of experts who presume to testify without even a fair view of the record. I was not at all impressed by that testimony with respect to the defense. I say that not unkindly, but in the very nature of things, it is difficult for a man to read general statements, reports, findings, coroners' findings, and come to a definite fixed opinion. Dr. Ryan's testimony, I believe, is sufficient to justify this Court in concluding that the injuries sustained by the deceased at the time in question as outlined in the complaint, inevitably and directly and proximately resulted in his death thereafter, at an early date in January.

With respect to the length of time which elapsed between the injuries sustained and the death of the deceased, there was the advice given by the doctor in San Mateo, who testified that he suggested rest and diet. That may well have appeared to the doctor at the time he gave his advice as the proper thing. I direct no criticism toward him. But at least the deceased sought medical advice, and I do not regard the delay as [221] an element of neg-

ligence on the part of the deceased in any sense.

Now, so far as negligence is concerned, I have made my findings for the record. I desire aid from counsel with respect to damage.

Mr. Bucher: Very well.

The Court: Give me briefs on that within, let us say, ten days. I will then rule on the matter.

Mr. Bucher: Yes, your Honor.

Mr. Scholz: Do I understand, your Honor, then, that you want counsel for the palintiff to file a brief and then me to reply to it?

The Court: Yes.

Mr. Bucher: Yes.

The Clerk: Five and five?

The Court: Ten days to each side.

The Clerk: So that the record may hereafter be clear, about these exhibits that are produced to be marked?

The Court: Well, these exhibits with respect to the findings made by the coroner, the findings made by Dr. Carr, the pathological findings, I assume that Dr. Carr made the pathological?

Mr. Scholz: That is true.

Mr. Bucher: Yes, your Honor, he did.

The Court: He generally makes them. I wanted them in the [222] record in the event the case should ever be reviewed.

Mr. Bucher: I understand.

The Court: Merely for the purpose of identification. I have in mind what they reflect, because you referred to them, counsel, and you also referred to them.

Mr. Bucher: Yes, your Honor.

The Court: But it is very difficult, in the review of a case, unless all the records are made available so that you can get the whole picture. Bear in mind that our circuit is dealing with cold records. I try in every case, so far as I am able, to get the full picture as I see it here in court, into the record.

Mr. Bucher: That is true.

The Court: The matter of damage is the important question in this case, and it is difficult.

Mr. Bucher: It is difficult, your Honor.

The Court: It is not an easy question. So I expect adequate, able and conscientious help, and I know I will get it from both of you.

Mr. Bucher: We will do our best.

Mr. Scholz: If your Honor please, do I understand your Honor, that you do want these copies of the pathological and so forth?

The Court: Yes.

Mr. Scholz: I will make copies and submit copies to your [223] Honor.

The Clerk: And for the sake of the record, let it be noted that when they are produced, it will be, with the Court's permission, marked by me as follows: The pathological report will be Defendant's C, and the picture of the Army truck will be Defendant's D.

The Court: Well, I am not so much concerned with the pictures of the Army truck. I am not so much concerned with the picture of that. As I said, Hammond's testimony is not convincing. His testimony was diametrically opposed to that of the driver, and I can't say very much for it.

Now well, gentlemen, that is all. [224]



Friday, March 5, 1948, 4:00 o'clock p.m.

The Clerk: Fotopulos vs. United States, for further trial.

Mr. Bucher: Ready.

Mr. Scholz: Ready.

Mr. Bucher: Shall I proceed?

The Court: Yes. If I may suggest, you might make a prefatory note for the transcript so that we may have a sequence of the last hearing with this hearing, showing the reasons underlying this hearing.

Mr. Bucher: I shall. At the original trial a stipulation was entered into by and between the parties, showing the income of the deceased upon which taxes were based for the years 1941 to 1946, inclusive. We have since then endeavored to ascertain the income of the deceased for the five years prior to 1941. It will be shown by the testimony of these witnesses that the deceased filed no income tax return prior to the year 1940; that in 1935 he entered into a partnership agreement with a partner who will testify today as to the income for those years from 1935 to 1941, and '42. The auditor who audited the books of the P. F. Casing Company, which was the company owned and operated by the deceased, began the audit of those books only in 1941, and he will so testify. We have examined the records of banks with whom the deceased transacted business, and we will have present as a witness this afternoon the [225] offi-

cer of the Bank of South San Francisco, with his record showing deposits, both commercial and savings, of the deceased from 1935 on, and with that preliminary statement may I call my first witness?

The Court: Yes.

ARTHUR BIANCHI,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Q. Will you state your name to the Court? A. Arthur Bianchi.

Direct Examination

Mr. Bucher: Q. Mr. Bianchi, were you acquainted with Peter Fotopulos during his lifetime? A. What?

Q. Were you acquainted with Peter Fotopulos during his lifetime? A. Yes, I was.

Q. Were you ever engaged in business with him? A. Yes, sir.

Q. As a partner? A. Yes, sir.

Q. During the partnership did you each own an undivided one-half interest of the business?

A. Yes, sir.

Q. Did that partnership—I don't want to lead the witness, but I think I can expedite this. [226]

The Court: In these preliminary features you may.

Mr. Bucher: Q. Did that partnership agreement begin July 1, 1936 and include, or expire, I should say, about February 15, 1945?

A. Yes.

Q. Mr. Bianchi, did you and Peter Fotopulos share equally in the profits of the business? Did

(Testimony of Arthur Bianchi.)

either you or he ever withdraw more money at one time than the other withdrew?      A. No, never.

Q. Do you know whether or not the partnership filed any income tax returns with the Treasury Department of the United States for the years 1936, '37, '38 and '39?

A. No, he never did.

Q. He did not. Did you file any returns for those years?      A. No.

Q. Do you know what your net earnings from the business amounted to during the year 1937?

(Addressing the Court:) If the Court please, may he refer to certain records he has?

Mr. Scholz: Are those your original records? May I ask a question, your Honor?

The Court: Yes.

Mr. Scholz: Q. Mr. Bianchi, those records you have in your hand here are original records?

A. No, they are income tax statements.

Q. They are income tax statements?

A. Yes. [227]

Q. What year?

A. 1940, '41, '42, '43, and '44.

Mr. Bucher: I don't think the witness understood my question. I asked the witness what his net income amounted to for the six months in 1936 during which they were in partnership.

Q. How much did you earn in the year 1936 per week, or per month?

A. About \$40 a week.

Q. About \$40 a week?

A. That's right.

(Testimony of Arthur Bianchi.)

The Court: Q. Was that how much you earned, or how much you drew? Is that what you earned?

A. Yes.

Q. How much did the deceased earn?

A. The same thing.

Mr. Bucher: Q. In 1937 about how much was it?

A. About \$40 a week.

Q. That was your net earnings? A. Yes.

Q. And he earned about the same amount?

A. Yes.

Q. In 1938 how much did you earn?

A. About 45.

Q. About \$45 a week? A. Yes. [228]

Q. And Mr. Fotopulos earned the same?

A. Yes.

Q. In 1939? A. In 1939, about 50.

Q. About \$50 a week? A. Yes, sir.

Q. And he earned the same thing?

A. He earned the same thing.

Q. For the year 1940 did you and Mr. Fotopulos file income tax returns?

A. Yes, we did.

Mr. Bucher: He is now speaking from the records, Mr. Scholz.

Q. You have a copy with you of the original income tax return filed for the year 1940?

A. Yes, sir.

Q. How much was your net income for the business year 1940? A. \$4468.95.

Q. Was the net income of Mr. Fotopulos the same? A. The same thing.

(Testimony of Arthur Bianchi.)

Q. How much was it for the year 1941?

A. '41 was \$5387.23.

Q. And his also was the same?

A. The same.

Q. How much was it for the year 1942? [229]

A. \$6182.86.

Q. And Mr. Fotopulos' was the same?

A. Was the same.

Q. How much was it for 1943?

A. For 1943 it was \$7552.55.

The Court: Q. Was that all net?

A. All net income.

Mr. Bucher: Q. And his was the same?

A. His was the same.

Q. How much was it for 1944?

A. 1944 was \$12,262.56.

Q. And his also was the same?

A. The same.

Q. You sold the business back to him on February 15, 1945, did you? A. Yes, sir.

Q. What consideration did you receive for your one-half interest? A. \$14,500.

Mr. Bucher: That's all, if the Court please.

Mr. Scholz: If your Honor please, I should suggest that the best evidence of the income from 1940 to 1944, inclusive, would be the income tax returns, themselves, rather than his testimony, and I assume, if in the absence of the original, which would be filed with the Internal Revenue, that the copies [230] be filed with the Court.

(Testimony of Arthur Bianchi.)

The Court: I think that counsel has already laid the foundation that these are copies in the possession of this gentleman.

Mr. Bucher: That's true.

The Court: And he has done the accounting for the firm.

Mr. Bucher: Yes.

The Court: And the originals are filed with the Bureau of Internal Revenue.

Mr. Bucher: That's right.

The Court: Prior to that time no returns were filed?

Mr. Bucher: Yes.

Mr. Scholz: My suggestion is that the copies be offered in evidence.

The Court: They may be received in evidence and marked appropriately.

Mr. Bucher: We will offer the copies of Mr. Bianchi's, if you will furnish us the copies that you have, and I think they can all go in as one exhibit. Do you have any objection to them going in as one exhibit?

Mr. Scholz: No.

The Court: So ordered.

(The copies of income tax returns were marked Plaintiff's Exhibit 5 in evidence.)

Mr. Bucher: Any cross-examination, Mr. Scholz? [231]

Mr. Scholz: No.

CLARENCE J. BROWN,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Q. Will you state your name to the Court? A. Clarence J. Brown.

Direct Examination

Mr. Bucher: Q. Mr. Brown, what is your business? A. Public accountant.

Q. Are you the successor to the business of H. A. Dittmer, public accountant?

A. That's correct.

Q. Are you now the owner of that business?

A. I am.

Q. Have you succeeded to all of the records and documents from the office of H. A. Dittmer?

A. Yes, sir.

Q. And you are in possession of all of the records, are you? A. Yes, sir.

Q. I ask you if you have recently had occasion to examine the records pertaining to Peter Fotopulos for the P. F. Casing Company?

A. Yes, I have.

Q. Have you found in those records any record of income tax returns during the past few years?

A. Yes, I have.

Q. Was the first record that you have of an income tax return filed by Peter Fotopulos as an individual or as a partner of the P. F. Casing Company one of those you found? A. Yes.

Q. What year was that for? A. 1941.

Q. And you have a record in your office of a copy of the income tax returns? A. Yes, sir.

(Testimony of Clarence J. Brown.)

Q. Have you made a digest or a report of those returns, Mr. Brown?

A. I have checked them to the detailed records that are in the office, yes.

Q. Have you before you a report of those returns that you prepared?

A. In this folder I have his tax returns for the years 1941 to '46, with the exception of '44.

Q. With the exception of '44?

A. Yes, but I have an audit report of the State of California on his 1944 return.

Q. Have you checked back or verified the returns which he made for those years in any manner?

A. Well, I have checked them to certified copies that Mr. Dittmer made up and checked them to detailed monthly reports to [233] show they do.

Q. And they do?

A. Yes, they do tie up.

Q. Have you checked them with any state agency?

A. Not except with the Franchise Tax Commissioner for the year of 1943 and '4.

Q. And did you make that check?

A. Yes.

Q. And do they check?

A. They are materially correct, yes. There are slight corrections here under "Deductions" only.

Q. What you have just shown me are the reports of the Franchise Tax Commissioner?

A. Yes.



(Testimony of Clarence J. Brown.)

Q. Mr. Brown, are you prepared to advise the Court of the net earnings of Peter Fotopulos for the year 1941?

A. Well, in accordance with his tax return that was filed for that year—do you want net return?

Q. Yes, net return—net income.

A. Net income, his taxable income varies during the course of this five-year period. You would rather have that total?

The Court: Let us have the gross income.

A. \$5423.23.

The Court: Q. As to the partnership?

A. Individually. His net income after deductions was \$5301.08. [234] 1942, total income \$6235.86, net income \$5802.07. 1943, total income \$7872.55; net income \$7159.70. The State changed the 1943 income tax return disallowing certain of the deductions and made the revised net income, that is, after deductions, \$7379.70. 1944 I do not have any returned copies, but according to the Franchise Tax Commissioner his revised net income is \$12,351.27. 1945 net income is \$16,318.39.

Mr. Bucher: Q. After deductions?

A. No, that is before deductions.

Q. That is before deductions?

A. Yes. The tax return changed during that period.

The Court: Q. What is the net?

A. The net is standard deductions. He did not take any contributions or anything of that nature.

(Testimony of Clarence J. Brown.)

In 1946 the same thing. They took the standard deductions, so the total income is \$18,574.76.

Mr. Bucher: Q. You have no record of any audit or of any tax returns having been filed prior to the year 1941? A. No, sir.

Mr. Bucher: That is all, if the Court please.

Mr. Scholz: No questions.

The Court: Q. You are a certified public accountant?

A. No, just a public accountant.

Q. Have you rendered a report to your principals? [235]

A. No, sir, not a copy of this. There is no facilities for— Well, it is very difficult to certify the statements as being absolutely reasonable or correct, because there is no facilities for internal control.

Q. What do you mean by that?

A. The company has to be of larger size and have more internal control so there are no opportunities for certifying statements on income received and pay-out expenses that are not recorded.

Q. This co-partnership, as I understand it, kept books of account? A. Yes, sir.

Q. What books did they keep?

A. Books of original entry and a general ledger.

Q. Including journal, cash book, accounts receivable, accounts payable— A. Yes.

Q. And profit and loss statements?

A. Yes, monthly.

(Testimony of Clarence J. Brown.)

Q. Monthly profit and loss statements?

A. Yes.

Q. Did you examine them? A. Yes.

Q. Are the profit and loss statements in accordance with the ultimate return? A. Yes, sir.

Q. You made a check on that? [236]

A. Yes, sir.

Q. Did they keep books prior to 1940?

A. I don't have any record of that.

Q. Did you inquire?

A. I was successor to Mr. Dittmer, who took over the records, and prior to that time we were advised that Mr. Bianchi took care of the records. We have no copies of them.

Q. Do you have any means of determining the accuracy or inaccuracy of the statement made by the gentleman who preceded you on the witness stand, as to the income of approximately \$40 or \$45 a week?

A. My reaction to it is if in the year 1941 they made some \$5000 apiece, I didn't see how they could earn \$5000 on \$50 a week.

Q. How, in a business of this character, could you have a precipitous jump, as marked or sharp between \$40 a week and \$5000 a year?

A. It may be they took on a new product or expanded their services.

The Court: The business had to do with sausage cases?

Mr. Booker: That's correct.

The Court: Q. It was sort of a one-man affair?

A. Yes, sir.

(Testimony of Clarence J. Brown.)

Q. You have taken over then, have you?

A. I have taken over the accountant's records, yes, sir.

The Court: Who is operating the business now?

Mr. Bucher: When he took it over?

The Court: Yes.

Mr. Bucher: The business or partnership more or less ceased.

The Court: Q. Upon the death of Mr. Fotopulos, do I understand that the business more or less ceased? A. It ceased.

Q. Inoperative? A. Inoperative.

Q. Is that correct?

A. Yes, sir, they made a loss in 1947.

The Court: Do I recall correctly that when the widow was in Court she testified she undertook to operate the business, or have a relative operate it?

Mr. Bucher: She tried, but couldn't make it.

The Court: Mr. Fotopulos was the guiding person and he undertook to contact the accounts?

Mr. Bucher: Yes.

The Court: Who made the deliveries?

Mr. Bucher: Fotopolus or his partner, or an office boy he would have.

The Court: Do you have any questions, Mr. Scholz?

#### Cross Examination

Mr. Scholz: Q. From your knowledge of the business, could you say that that was a business that could only be [238] run by Mr. Fotopulos?

A. This particular business, yes, sir.

(Testimony of Clarence J. Brown.)

Q. No one else could run it?

A. That I couldn't say.

Q. That was the question I asked you.

A. It is difficult to say. I took the records over in December.

Q. Are you acquainted with how they conducted the business?

A. No, sir, when I took over they were not in existence.

Q. The only thing you know are the records they presented to you?      A. Yes.

Q. Were you ever out there?      A. No, sir.

Q. You never saw the place of business?

A. No, sir.

Q. I don't want to be argumentative, and you may not be able to answer this question, and if you cannot, just say so. Wouldn't it strike you that with the business of \$18,000 in 1946, that that business could be sold instead of being terminated with a loss for a few months in 1947?

Mr. Bucher: If the Court please, I object to that.

The Court: Sustained.

Mr. Scholz: That's all.

Mr. Bucher: May I recall Mr. Bianchi, for a moment? [239]

The Court: Yes.

## ARTHUR BIANCHI,

recalled as a witness on behalf of plaintiff; previously sworn.

## Redirect Examination

Mr. Bucher: Q. Mr. Bianchi, when you testified before, you stated, I believe, in the year 1939 your net income amounted to about \$50 a week, is that correct? A. Yes, sir.

Q. Which would be around \$2500 for the year, and in 1940 your income was \$4468.95, is that correct? A. Yes, sir.

Q. Nearly \$2000 more. How do you account for the increase of \$2500 for 1939 to \$4500 for 1940, if you can account for it? Did you take on any additional accounts, or what?

A. No, we worked more casings. We got a new place in Oakland, the Golden West Meat Company in Oakland.

Q. I didn't hear that.

A. We got the Golden West Meat Company, in Oakland.

Q. That increased the volume of your business substantially, didn't it? A. Yes, sir.

Q. That was the first year for which you filed an income tax return? A. Yes, sir. [240]

Mr. Bucher: That's all.

## Cross Examination

Mr. Scholz: Q. Mr. Bianchi, you stated that in 1940 your income was \$4468, and then Mr. Fotopulos' income was \$4468, likewise, is that right?

(Testimony of Arthur Bianchi.)

A. Yes, sir.

Q. Then in 1944 you sold out—

A. No, 1945.

Q. Was that February 15, 1945?

A. Yes, sir.

Q. Was there any change in the method of your conducting your business from the time you started until the time you sold out?      A. Any what?

Q. Any change in the method of conducting your business.

A. No, it went right along.

Mr. Scholz: That's all.

### Redirect Examination

Mr. Bucher: Q. Your daughter kept the books during part of the time you were in partnership?

A. Yes, sir.

Q. Have you made a search of those old records?

A. I left everything down in the office and I don't know what became of them.

Q. You haven't found anything, yourself?

A. No. [241]

The Court: How long did you know the deceased, Mr. Fotopulos?

A. Oh, I knew him about ten years before.

Q. Did he always confine his activities to this type of business?

A. Since I know him, yes, since about 1925 or 1926 I know him.

Q. He was concerned with the business of the manufacture and sale and vending of cases?

(Testimony of Arthur Bianchi.)

A. No, he was working.

Q. Working for a day wage? A. Yes.

Q. What was his occupation?

A. Casing worker.

Q. Always casing? A. Since I know him.

The Court: That's all.

Mr. Bucher: That's all.

Mr. Scholz: That's all.

### PETER BALESTRACCI,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Q. State your name to the Court?

A. Peter Balestracci.

### Direct Examination

Mr. Bucher: Shall I proceed, your Honor?

The Court: Yes. [242]

Mr. Bucher: Q. Mr. Balestracci, what is your business or occupation?

A. Assistant cashier, Bank of South San Francisco.

Q. Were you acquainted with Peter Fotopulos during his lifetime? A. Yes, sir.

Q. Did you have any banking business transactions with him during his lifetime?

A. We did.

Q. Your bank, I mean. A. Yes, sir.

Q. Have you examined the accounts of Peter Fotopulos with your bank for a period of ten years last past?

A. Yes, sir, I have the records here.



(Testimony of Peter Balestracci.)

Q. You brought the records with you?

A. Yes.

Q. From those records I will ask you whether or not you could advise the Court as to the status of the savings account, if any, of the deceased, Peter Fotopulos, beginning with the year 1935.

A. From 1935 to 1939 there has been deposited in his savings account \$4375.

Q. Now, you are also acquainted with his commercial account, are you?      A. I am. [243]

Q. I will ask you if you can state to the Court the deposits of the business annually, beginning with 1935?      A. I have added these up.

Q. I beg your pardon?

A. I have added the amounts that were deposited to his commercial account. They amounted to \$7100 in 1936; \$14,200 in 1937; \$19,300 in 1938; \$31,300 in 1939; and \$30,200—

Q. That's all you brought with you?

A. That's right.

Q. Do you know anything about the net earnings of Peter Fotopulos during his lifetime?

A. Not exactly, with the exception of his income tax return record.

Q. You only know from the time he was filing income tax returns?      A. Yes.

Q. Did you prepare some of them for him?

A. Yes.

Q. Do you recall for what years?

A. I can't recall the years exactly, but I think

(Testimony of Peter Balestracci.)

it was 1941 and 1942, but I am not positive of the years.

Q. You don't know anything about his net earnings prior to 1940?      A. No, I don't.

Mr. Bucher: That's all. [244]

**Cross Examination**

Mr. Scholz: Q. Did Mr. Fotopulos ever borrow money from you during that period of time?

A. Off and on, yes, sir.

Q. On his note or security?

A. Mortgage and personal notes, also.

Q. And the mortgage was on some real property?      A. Yes, sir.

Q. In South San Francisco?      A. Yes, sir.

Q. What would the sums average, about?

A. I can't recall, exactly, but I think about three or four thousand.

Q. During what years was that?

A. Prior to 1940.

Q. But that was all secured by mortgage on the real property?      A. Yes, sir.

Mr. Scholz: That's all.

Mr. Bucher: That's all. May this witness be excused?

The Court: Yes.

Mr. Bucher: That is the only evidence we can produce, your Honor.

The Court: Mr. Scholz, and counsel, many weeks have elapsed and the case was partially submitted by reason of your absence from the jurisdiction. I indicated to Mr. Mitchell that I desired this testimony with respect to the earnings spread over [245] a period of time.

With respect to the negligence aspects of the case, there was no question in my mind of the trial, nor is there any question in my mind now that the rear end collision which took place in the vicinity of Bush and Van Ness Avenue immediately opposite the automobile salesrooms of Neil McNeil & Company, that that accident was the result of and proximately caused by the negligence of the driver of the Army truck. The impact on the rear end, as I recall, was of sufficient force to cause this truck's steering wheel to protrude into the stomach of the deceased. There was a buckling operation. The truck of the Army was quite heavy and the truck that the plaintiff was driving was a light pickup type, and by some chemical process having eroded the structure of the light truck may have contributed to the lack of density in the steel, but in any event the impact was a forceful one, causing, as I have said, the steering wheel to protrude into the stomach of the deceased, or at least he registered that complaint immediately thereafter to his wife.

What is your position, Mr. Scholz, with respect to the causal relationship, having in mind the medical aspects of the case?

Mr. Scholz: As I understand your Honor's question, it is, would the impact be sufficient to cause his death? Is that your Honor's question?

The Court: There is no evidence in the record denying the impact. That stands uncontradicted. We must accept that.

Mr. Scholz: But how forceful that impact was I cannot say. I think that is purely a question for

the Court. The testimony varies. You may recall that the Army captain testified that the mud was knocked off the back part, and then, on the other hand, you have testimony that there was a buckling of the body of the pickup truck. I don't think that is undisputed, but I think it is purely a question for the Court to decide which was which.

The Court: Has the transcript been written up?

Mr. Bucher: No, it has not been. The testimony was to the effect that there was a puncture of the bowel and peritonitis followed, and death followed practically immediately after the operation. That was Dr. Ryan's testimony.

The Court: Dr. Russell Ryan testified in the case, and I recall that was his testimony.

Mr. Scholz: In view of the fact that some time has elapsed since we have heard the evidence, it might be well to have the testimony written up.

Mr. Bucher: Dr. Ryan testified as to the condition of the deceased when he first examined him, the condition on operation, the condition as disclosed, and the autopsy findings were submitted in the record.

The Court: The deceased visited a doctor in San Bruno [247] who testified. Of course, there is the contention that if that doctor had intervened sooner in the case he might have saved the man's life. I am not passing upon that phase of it, nor am I criticizing the doctor, at all, but there seemed to be, according to my best recollection, a period of four or five or six days that intervened.

Mr. Fotopulos was unruly and hard to manage,

and would not subject himself to any medical examination. That is the testimony of his wife. However, he did send for this doctor, who tried to give him some superficial treatment and give him some pills. The pain became increasingly more difficult for the man to bear, and his wife called in Dr. Ryan's assistant first, and then, the next morning, Dr. Ryan. As I recall Dr. Russell Ryan's testimony, he observed what he regarded as a surgical stomach, and immediately ordered him to the hospital. He recommended immediate hospitalization and surgery.

Dr. Russell Ryan's findings are embraced in the report, are they?

Mr. Bucher: Yes, your Honor.

The Court: Peritonitis?

Mr. Bucher: Yes, peritonitis. He said there was no question about the rupture of the bowel.

The Court: Is there any evidence in the record concerning a condition of appendicitis?

Mr. Bucher: He said the appendix was approximately normal. [248] He first suspected an appendix before operation, but on operation found the appendix was normal.

The Court: He had a suspicion, that's right. The appendix was normal.

Mr. Bucher: Yes.

The Court: What did Dr. Carr find on the appendix?

Mr. Bucher: Normal.

The Court: Does the record show that immediately after this accident that the deceased, Mr.

Fotopulos, repaired to his home and did no further work?

Mr. Bucher: The record shows he repaired to his home and complained to his wife that he was nauseated and he vomited, and the next morning he went to work under distress and worked a few hours after that, but still complaining in an increasing manner of pain until finally she persuaded him—

The Court: Is that an accurate statement, Mr. Scholz? Bear in mind that I have tried many cases since this, Counsel.

Mr. Scholz: It is difficult for me to recall it.

The Court: In fairness to the Government, to the plaintiff, and to the Court, I think it only fair to ask this transcript be written up.

Mr. Bucher: The Court will recall that at the time it was tried the question came up as to whether it should be written up and the Court indicated then it desired some evidence of earning power and it would not be necessary to have the record [249] written up. The Court was of the opinion as indicated today. That is our position. The statement which I made to the Court I know so well that I know my statement is correct and would be sustained by the record. I don't want to dispute Mr. Scholz on the matter, but I know it is correct.

Mr. Scholz: You are not disputing me. I did not question that.

The Court: Will the Government have the record written up?

Mr. Scholz: Yes, the Government will have the

record written up if it will assist the Court, of course.

The Court: I was inclined to view at the summation of the case that there was a causal relationship between the injury and the ultimate death. My recollection then was, of course, better than my recollection now of the facts. Many matters have transpired. Lurking in my memory, however, is the matter of this appendix, prior complaint was made, and on that phase I should like to examine the record.

According to Dr. Russell Ryan's findings there was no showing of trauma or evidence of trauma. Am I correct?

Mr. Bucher: That's correct, there was no objective finding prior to operation. He stated in his testimony that his conclusion was based upon specific findings on operation, and he analyzed clearly the relationship between the nerve and the transverse colon, the deficiency in the blood supply [250] causing the perforation which follows a trauma as indicated by the deceased. Dr. Ryan analyzed that very clearly from the witness stand.

The Court: Did the Government present any medical?

Mr. Scholz: Yes, we did.

Mr. Bucher: Your medical consisted of the gentleman from the Navy Hospital.

Mr. Scholz: Yes.

The Court: Yes, the gentlemen from the Navy Hospital. But they never saw the deceased.

Mr. Scholz: They never saw the deceased.

The Court: And never made made an examination.

Mr. Scholz: Their testimony was purely from the record.

The Court: And one gentleman, as I recall, testified only on a hypothetical.

Mr. Bucher: They both testified on hypothetical cases.

Mr. Scholz: Yes, in the sense that all they did was examine the pathological and other records in the case and testified from the pathological and other records in the case.

The Court: Very well, gentlemen, the matter may stand submitted when as and if the transcript is received. [251]

[Endorsed]: Filed April 1, 1948.

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[Endorsed]: No. 12066. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Diamond Fotopulos and Thomas Fotopulos and Joan Fotopulos, minors, by and through their guardian ad litem, Diamond Fotopulos, Appellees. Transcript of Record. Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 18, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



In the United States Court of Appeals  
For the Ninth Circuit.

No. 12066

THE UNITED STATES OF AMERICA,  
Appellant,

vs.

DIAMOND FOTOPULOS and THOMAS FOTO-  
PULOS, and JOAN FOTOPULOS, minors, by  
and through their guardian ad litem, Diamond  
Fotopulos,

Appellees.

### STATEMENT OF POINTS

To the Clerk of the above-entitled Court:

The appellant hereby designates the Statement of Points to be Relied Upon on Appeal which it filed with the Clerk of the United States District Court at San Francisco, California, on August 20, 1948, as its Statement of Points to be Relied upon on Appeal in the United States Court of Appeals for the Ninth Circuit.

/s/ FRANK J. HENNESSY,  
United States Attorney,  
Attorney for Appellant.

[Endorsed]: Filed December 16, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

To the Clerk of the above-entitled Court:

The appellant hereby designates the Praecipe for Preparation of Record on Appeal which it filed with the Clerk of the United States District Court at San Francisco, California, on August 20, 1948, at its Praecipe for Preparation of Record on Appeal in the United States Court of Appeals for the Ninth Circuit.

/s/ FRANK J. HENNESSY,  
United States Attorney,  
Attorney for Appellant.

[Endorsed]: Filed December 16, 1948. Paul P. O'Brien, Clerk.

No. 12066

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United States  
Court of Appeals

for the Ninth Circuit

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UNITED STATES OF AMERICA,

Appellant,

vs.

DIAMOND FOTOPULOS and THOMAS FOTOPULOS and JOAN FOTOPULOS, minors, by and through their guardian ad litem, Diamond Fotopulos,

Appellees.

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S U P P L E M E N T A L

Transcript of Record

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Appeal from the United States District Court  
for the Northern District of California,  
Southern Division

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## NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY, Esq.,  
United States Attorney,  
Northern District of California,  
Post Office Building,  
San Francisco, California,

Attorney for Defendant and Appellant.

CARROLL S. BUCHER, Esq.,  
924 Mills Building,  
San Francisco, California,

Attorney for Plaintiffs and Appellees.

In the Southern Division of the United States District Court for the Northern District of California

No. 26833-H

DIAMOND FOTOPULOS and THOMAS FOTOPULOS, and JOAN FOTOPULOS, minors, by and through their Guardian ad litem, Diamond Fotopulos,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

### STIPULATION

It is hereby stipulated by and between the parties hereto that the following statements may be accepted as true and without affirmative proof and may be considered as evidence in the trial of the above action.

1. That at the time of the accident sued upon in this case, Peter Fotopulos was driving the Dodge pickup truck involved in the accident.

2. That he was then of the age of 49 years, and his life expectancy on December 23, 1946, was 23.36 years.

3. That he was married to the plaintiff and guardian ad litem on November 24, 1935.

4. That he left surviving him his widow, age 29 years, and two children: Thomas F. Fotopulos, aged 10 years and Joan F. Fotopulos, aged 9 years.

5. That Peter Fotopulos died on January 10, 1947.

6. That Peter Fotopulos, at the time of the accident sued upon herein was the sole owner of the business known as the P. F. Casing Company.

7. That the net earnings of Peter Fotopulos upon which he paid Federal Income Taxes were as follows:

(a) For the year 1943.....\$ 7,872.55

(b) For the year 1945..... 15,195.92

(c) For the year 1946..... 18,574.76

8. That plaintiff, who is the widow of Peter Fotopulos, has no property or income separate and apart from her community interest.

/s/ CARROLL S. BUCHER,  
Attorney for Plaintiff.

/s/ FRANK J. HENNESSY,  
By /s/ RUDOLPH J. SCHOLZ,  
Attorneys for Defendant.

[Endorsed]: Filed Dec. 4, 1947.

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[Title of District Court and Cause.]

## MEMORANDUM OF PLAINTIFF OF ACTUARIAL FACTORS

Peter Fotopulos was of the age of forty-nine (49) years at the time of his death on January 10, 1947. He was the sole owner and operator of a business known as the "P. F. Casing Company" and started in such business about twenty years previously. Notwithstanding the lean years of recession, he had kept the business going, sometimes with a partner and at other times by himself. He gradually built the busi-

ness to return a substantial income which, during the last five years of his life, increased upon a uniformly ascending scale. He had had no partner for several years prior to his death and was then receiving the entire income from the business.

He was a good business man but evidently knew little about bookkeeping, so in the latter part of 1940 he employed Adine M. Dittmore, a public accountant, to do this part of his work for him. Since then the accountant has not only made periodical audits but actually kept all of the books and records of the business and annually prepared and filed the income tax returns for the deceased.

We attach to this memorandum and submit for the consideration of the Court a statement prepared by this accountant to show the net profits to deceased for each year beginning January 1, 1941. The accountant's statement is limited strictly to the business of the P F Casing Company and does not include any rents or income from other sources.

It is significant from this statement that upon his death the business completely failed.

The widow tried for a few months to carry on but the personality and individual ability of the deceased was gone and during 1947 she operated at a loss of \$3,165.32.

In determining the amount of a judgment in damages, as here, six elements may be considered.

1. The life expectancy of deceased.
2. The relationship of the dependents to the deceased.
3. The earning power of deceased.



4. The amount of money deceased would have paid for the widow and his two children had he lived.

5. The present purchasing power of a dollar.

6. The amount of money required to produce a monthly income for the support of the widow and children, as an annuity for the period of the expectancy of the deceased, consideration being given to the periods when the children will reach their majorities.

On the day of his death Peter Fotopulos had a life expectancy of 23.36 years. He left surviving him his son Thomas F. Fotopulos who was then of the age of 10 years, Joan F. Fotopulos, his daughter, who was of the age of 9 years, and his widow Diamond Fotopulos, all of whom he then supported. Therefore Thomas would have been provided for for eleven years, Joan would have been supported for twelve years, and Diamond, his widow, would have been provided for the life expectancy of the deceased.

No one can tell what amount the deceased would have spent on his family each month had he lived. But to arrive at a fair estimate of such amount we can give consideration to his earning power, and endeavor to determine how much a man, earning what the deceased earned, would reasonably have so spent. The average annual earnings for the past five years, according to the auditor's statement, is \$12,000.00 and we respectfully submit such is a fair amount to be used as a guide to determine how much he would have spent for support.

And we further submit that, considering the

present purchasing power of the dollar, it is fair to consider, having in mind his net earnings from his business to be \$12,000.00 a year, that the support of his wife and two children, their education, clothing, food, housing and incidentals, would have cost deceased an average of \$450.00 per month.

In determining the amount of money required to return \$450.00 per month for the periods of time indicated, the interest from a sound investment of such capital should operate as a credit. Two to three per cent is about the maximum rate the widow could invest with absolute security.

Gordon Thomson, formerly and for many years the actuary for the West Coast Life Insurance Company, has compiled a statement showing the amounts required to produce certain incomes at different interest rates, the principal vanishing at the expiration of the life expectancy, and which is herewith attached. This, we believe, furnishes a fair yard stick to measure the damages that should be assessed and we respectfully submit the matter to the sound judgment of the Court.

/s/ CARROLL S. BUCHER,  
Attorney for Plaintiff.

Copy of the above Memorandum and Exhibits acknowledged this 12th day of December, 1947.

FRANK J. HENNESSY,  
United States Attorney,

By /s/ T. SOLOMON,  
Attorney for Defendant.

Adine M. Dittmore  
Public Accountant - Notary Public  
995 Market St., San Francisco, Calif.

December 10, 1947

### CERTIFICATE

This is to certify that I am a Public Accountant in the City and County of San Francisco.

Since the year of 1940, I have had complete charge of all books, records, and financial statements of Peter Fotopulos, doing business under the firm name and style of P. F. Casing Company, and during that period have kept a continual record and audit of the books of that firm.

My records show the following amounts which represent the annual net income or loss of Peter Fotopulos from the business for the years indicated. These figures do not represent partnership income, but the income of Peter Fotopulos from the business only.

1941	.....	5,387.23
1942	.....	6,182.86
1943	.....	7,552.55
1944	.....	12,262.56
1945	.....	16,059.64
1946	.....	18,316.08
1947 (Loss to 12/1/47)	.....	3,165.32*

\* Figures in red.

ADINE M. DITTMORE,

Accountant for P. F. Casing Co.

By /s/ JOSEPH F. BALZER,

Gordon Thomson, F.F.A.; F.A.I.A.

Consulting Actuary, 605 Market St., San Francisco

Certificate of Valuation of Monthly Annuities Certain on Bases Stated for Carroll S. Bucher, Attorney at Law, Mills Building, San Francisco.

Definitions of Annuity Certain Payable  
Monthly

This type of annuity is payable for a definite period of time without involvement of the element of mortality. In computing the present value the factors involved are the amount of the monthly payment, the number of months during which payable and the rate of interest used to discount to the present time the value of the future payments.

The periods of time were furnished by Mr. Bucher who explained they were based on an Expectation of Life Table, with the proviso that in the case of **the two children, the annuities would terminate in** each case at age 21. Each monthly payment consists of interest earned plus that portion of the principal necessary to make up the amount of the monthly payment and with the last monthly payment the principal is exactly exhausted.

## Tables of Values

## (A)

Period assumed for boy aged 10-11 years or 132 months

Present value of	Interest Rate per Annum				
	4%	3½%	3%	2½%	2%
\$100 per mo.	\$10665.	\$10943.	\$11231.	\$11530.	\$11840.
90 per mo.	9598.	9849.	10108.	10377.	10656.
80 per mo.	8532.	8754.	8985.	9224.	9472.

## (B)

Period assumed for girl aged 9-12 years or 144 months

Present value of	Interest Rate per Annum				
	4%	3½%	3%	2½%	2%
\$100 per mo.	\$11422.	\$11745.	\$12080.	\$12430.	\$12793.
90 per mo.	10280.	10571.	10872.	11187.	11514.
80 per mo.	9138.	9396.	9664.	9944.	10234.

## (C)

Period assumed for widow—23.36 years or 280.32 months

Present value of	Interest Rate per Annum				
	4%	3½%	3%	2½%	2%
\$300 per mo.	\$54593.	\$57395.	\$60407.	\$63650.	\$67142.
270 per mo.	49133.	51656.	54366.	57285.	60428.
240 per mo.	43674.	45916.	48326.	50920.	53714.

## (D)

Total Values—Sum of Values in Tables A, B, and C

Present value of 3 annuities	Interest Rate per Annum				
	4%	3½%	3%	2½%	2%
\$300, \$100, & \$100 per mo.	\$76680.	\$80083.	\$83718.	\$87610.	\$91775.
\$270, \$90 & \$90 per mo.	69011.	72076.	75346.	78849.	82598.
\$240, \$80 & \$80 per mo.	61344.	64066.	66975.	70088.	73420.

I hereby certify the correctness of the above calculations.

Dated at San Francisco this eleventh day of December, 1947.

/s/ GORDON THOMAS,  
Consulting Actuary.

[Endorsed]: Filed Dec. 12, 1947.

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[Carroll S. Bucher Letterhead]

March 17, 1948

Honorable George B. Harris,  
Judge of the U. S. District Court,  
Post Office Building,  
7th and Mission Streets,  
San Francisco, California.

Re: Fotopulos vs. U. S. A. No. 26833-H

My dear Judge Harris:

Relating to the question of the amount of damages sustained by the plaintiffs in the above case I respectfully refer you to a decision of our U. S. Circuit Court of Appeals of Aug. 26, 1947 in the case of Southern Pac. Co. vs. Zehnle, 163 Fed. (2d), 453, 454. In this case the court affirmed the judgment of the lower Court and held that:

“The jury was entitled to consider, as it did, the century’s continued depreciation of the pur-

chasing value of the dollar with the extraordinary acceleration of the rate of decrease of the past decade.”

The Court further referred to a California decision with a similar ruling decided as early as 1928, —O’Meara vs. Haiden, 204 Cal. 354, 367: 268 Pacific 334.

On March 18, 1947 the District Court of Appeals of California in the case of Brown vs. Boehm, 78 Cal. App. (2d) 595, 603 held:

“There is also the further consideration that the value of the dollar has decreased substantially, thus making awards in earlier cases unsubstantial as yardsticks for measuring verdicts during the post war times.”

And more recently on July 16, 1947 the same Court reaffirmed this rule in the case of Couch vs. Pac. Gas & Elec. Co., 80 Cal. App. 857. In this decision the Court likewise held:

“Under the decision cited in the Brown case we cannot say that the amount fixed by the Court is excessive. As there pointed out, the value of the dollar has materially decreased in recent years and that fact has been recognized by Appellate Courts in refusing to reduce verdicts which formerly might have been considered excessive.”

I am sending a copy of this letter to Mr. Rudolph J. Scholz, Attorney for the Defendant.

With due appreciation of my privilege in submitting these authorities to you, I remain,

Very respectfully yours,

/s/ CARROLL S. BUCHER,

CSB/s

cc: Rudolph J. Scholz,  
Attorney at Law.

[Endorsed]: Filed March 23, 1948.

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[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL DOCUMENTS FOR RECORD ON APPEAL

To the Clerk of the above entitled Court:

Please prepare a supplemental Transcript on Appeal in the above case to include the following documents and forward the same to the Clerk of the United States Court of Appeals, in the Post Office Building, San Francisco, California.

1. Stipulation between Counsel filed December 4, 1947.
2. Memorandum of Plaintiff filed December 12, 1947.
3. Letter from Carroll S. Bucher to Judge George B. Harris filed March 23, 1948.

/s/ CARROLL S. BUCHER,  
Attorney for Plaintiff.

Copy forwarded to Frank J. Hennessy, U. S. Attorney, February 2, 1949.

[Endorsed]: Filed February 3, 1949.



[Title of District Court and Cause.]

**CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the Supplemental Record on Appeal herein, as designated by the Plaintiff-Appellee.

Stipulation, filed December 4, 1947.

Memorandum of Plaintiff of Actuarial Factors, filed December 12, 1947.

Letter from Carroll S. Bucher to Judge George B. Harris, filed March 23, 1948.

Designation of Additional Documents for Record on Appeal, filed February 3, 1949.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 3rd day of February, A.D. 1949.

(Seal)

C. W. CALBREATH,  
Clerk.

[Endorsed]: No. 12066. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Diamond Fotopulos and Thomas Fotopulos and Joan Fotopulos, minors, by and through their guardian ad litem, Diamond Fotopulos, Appellees. Supplemental Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 3, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.





No. 12,066

IN THE

United States Court of Appeals  
For the Ninth Circuit

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UNITED STATES OF AMERICA,

*Appellant,*

vs.

DIAMOND FOTOPULOS and THOMAS FOTOPULOS and JOAN FOTOPULOS, minors,  
by and through their guardian ad  
litem, Diamond Fotopulos,

*Appellees.*

BRIEF FOR APPELLANT.

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FRANK J. HENNESSY,

United States Attorney,

Post Office Building, San Francisco 1, California,

*Attorney for Appellant.*

FILE

MAY 3 1949



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No. 12,066

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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UNITED STATES OF AMERICA,

*Appellant,*

VS.

DIAMOND FOTOPULOS and THOMAS FOTOPULOS and JOAN FOTOPULOS, minors,  
by and through their guardian ad  
litem, Diamond Fotopulos,

*Appellees.*

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**BRIEF FOR APPELLANT.**

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**STATEMENT OF THE CASE.**

**Nature of the Case.**

This is a suit under the "Federal Tort Claims Act". Peter Fotopulos was driving a 1936 Dodge Pick-up Truck in a northerly direction on Van Ness Avenue, San Francisco, near the intersection of Van Ness Avenue and Bush Street. The Government's employee was driving a Chevrolet truck known as a ton and a half, 6 x 6, in the same direction. The Government vehicle stopped at Sutter Street and Van Ness Avenue, then proceeded approximately 15 miles per hour

toward Bush Street along the inner lane on the east side of Van Ness Avenue.

Then the contention of the parties differ. Appellant contends that Fotopulos' truck was proceeding behind the Government truck but in the outer lane of the east side of Van Ness Avenue, until it approached the safety zone (marked with white lines) near the intersection of Van Ness and Bush Streets and which extends along the eastern street car track and ends at the intersection. As Fotopulos was about thirty or forty feet from the intersection, he turned his truck to his left immediately in front of the Government vehicle. The Government driver, as Fotopulos cut in front of him, applied his brakes and slowed the vehicle to such an extent that he hit Fotopulos' vehicle only hard enough to break the tail light and hinges of the tail light, if it did that. There was no damage to the fenders of Fotopulos' vehicle (R.T. 72-76). The impact did not knock off the mud on the Government vehicle and caused no damage to it except some paint was scraped off the right side of the front bumper (Tr. 109.) That therefore Fotopulos was negligent. The damages to Fotopulos' truck was so slight that no claim was made or proven. However, the damages were complicated by Peter Fotopulos dying after an operation on January 10, 1947. The accident happened on December 23, 1946. The Government contends his death was not the result of this accident.

Appellee contends that Fotopulos was driving his truck on the inner lane and stopped his truck at the crosswalk of the intersection, and when he stopped, the

Government vehicle collided with the rear of Fotopulos' truck, forcing his vehicle into the car ahead and caused injuries to Fotopulos that resulted in his death.

---

**STATEMENT OF POINTS TO BE RELIED UPON  
ON APPEAL.**

That the trial Court erred:

1. In finding the defendant United States of America negligent in the operation of its vehicle;
2. In finding Peter Fotopulos was not guilty of contributory negligence;
3. In finding that his death was caused by the collision;
4. In excluding evidence of other accidents or sickness;
5. In not finding how much of the disability resulted from the injury and what disability resulted from other causes;
6. In awarding excessive damages;
7. In that there is insufficiency of evidence to justify the trial Court's decision.

**AS TO THE FINDING THAT THE UNITED STATES WAS NEGLIGENT IN THE OPERATION OF ITS VEHICLE, AND/OR THAT PETER FOTOPULOUS WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.**

The appellee produced no eye witnesses. The Government produced two—the Army driver of the Government vehicle and a man riding in the Government vehicle. The driver, C. A. Bailey, had been discharged and was working as a moulder with the Prophylactic Brush Co. at Florence, Massachusetts. His testimony supported the contention of the Government as set forth hereinabove, to-wit: (Figures refer to Reporter's Transcript unless otherwise indicated.)

Fotopulos was driving in the extreme right lane. Bailey was driving in the inner lane (127). Fotopulos cut from the right lane into the lane in front of him. There was no way to avoid hitting him (128). Bailey was going approximately fifteen to eighteen miles per hour before the accident. He did not notice the stop signal as he did not get that far before Fotopulos cut in front of him, and at that time he thought only of stopping. He immediately applied his brakes (130). Fotopulos gave no signal (131). Bailey reduced his speed as he approached the intersection (132). Fotopulos was going faster than Bailey. The right front of the Government vehicle came in contact with the left rear of Fotopulos' vehicle (133). Fotopulos said he wasn't injured (135). The cross-examination apparently made no difference in his testimony (136 through 151 and 153 through 162). The chart referred to in this deposition is Plaintiff's Exhibit 3) (141).

Bailey did not see two men run to the scene of the accident (155). The right end of the front bumper of the Government vehicle had a crease in it about fifteen inches, which was all the damages to the Government vehicle (155). The rear of Fotopulos' vehicle hardly had a mark on it. The top part of the grille was punched back (157). This may have been caused by Fotopulos hitting a truck before this impact (147-134). There was no damage to the mudguard of Fotopulos' car.

The Government witness, Hammond, was not present in Court on December 5, 1947, due to illness. The medical statement in the record showed he would be available any time after December 8, 1947. The Government desired to produce him in Court. However the appellee desired to read the deposition of the witness instead of waiting until December 8, 1947 (122) and it was read (166). Hammond testified that a Dodge '36 Pickup Truck came up alongside of the Government vehicle and cut into the lane in which the Government car was being driven (167). As the Government vehicle approached the intersection it slowed down because of the stop signal (as he considered it), then the Dodge '36 truck came up on the right of the Government vehicle and cut into the Government vehicle's lane. At that time the Government vehicle was traveling about ten miles per hour (170) and Fotopulos was traveling between fifteen and twenty miles per hour. The Government vehicle's right front hit the Dodge vehicle left rear. The picture showing the "crease" on the Government vehicle's right front bumper was of-

ferred in evidence and marked "Defendant's Exhibit A" (171-173). Defendant's Exhibit B shows the Dodge truck. It was stipulated that any damages shown on the truck was not the result of this accident (175); that the Dodge truck when hit was "kind of across the lane, setting kind of crossways" (177); that Bailey threw on his brakes as soon as he saw Fotopulos cutting in front of him. He knocked it against the truck ahead, just hardly bumping it (18). Fotopulos did not give any signal (179) nor did he complain of any hurts (180). Bailey stopped at Sutter and Van Ness (183). The speed of the Government vehicle was about fifteen miles per hour between Sutter and Bush. It was in second gear (184). The Government vehicle did not hit Fotopulos' vehicle in center of the rear (191). The right rear part of Fotopulos' vehicle was not damaged (192). The Dodge truck of Fotopulos was not in the safety zone. It did not get that far over the line (195). The witness had not seen Bailey since the accident. The Government vehicle did not hit the Dodge truck with very much force (198). The mark (crease) on the Government vehicle was not there before the accident (201).

Against this testimony of two actually uninterested eye witnesses, widely separated and without having discussed the matter between them, is the testimony of two uninterested witnesses of the appellee who did not see the accident.

Justin L. O'Neil testified for appellee: he was in his office and he heard a crash (88). He walked to the front of the door and walked out in the street where

the vehicles were. When he got there the one vehicle was behind the other. The front of Fotopulos' vehicle (the grille) had been pushed in, but whether that had been done by this accident, he did not know (89). There was no car in front of Fotopulos' vehicle. The damage to Fotopulos' vehicle was possibly more on the left side. Fotopulos' vehicle was parallel to the track and the Government vehicle might have been a little bit to the left behind Fotopulos' vehicle. The vehicles were about eight or nine feet apart when he got there (90). The front end of the Dodge truck was in the cross-walk. The Government vehicle was more to the west, or left (91-92). He never saw any vehicle in front of the Dodge truck (93). He did not spend much time in observing the accident (94). He did not observe any damages to the Dodge truck except the tailgate and the body seemed to be bent. He did not observe any damages to the Government vehicle although he looked at it. He did not see any mud knocked off the Government vehicle. The damage to the Dodge truck was more to the left than center (95).

Harry A. Faelor testified for appellee: he was in Neil McNeil's office sitting at a desk when he heard a crash (77). The Government car was directly behind the Dodge truck. He did not know if the red light was on at that time (79). Fotopulos was arguing with "them" (who?). The fellow said "Well the brakes did not hold, *or I couldn't help it*" (Italics ours). There were three of them arguing (86). O'Neil was with him. Whether the "Stop" and "Go" signals at Van Ness and Bush can be seen by an auto from Sutter Street

depends on whether a street car is in the line of vision. If no street car, he did not know if it could be seen. He did not see any truck ahead of Fotopulos' vehicle (80). He did not observe any damage to the front of Fotopulos' vehicle but he noticed the rear tailgate was smashed and it was bent in the middle (81). (The Court will observe that the tail-light is on the left rear of the Dodge truck.) He walked between cars that were parked at the curb, to the scene of the accident. He saw Fotopulos come into his place of business. Fotopulos wanted to use the telephone. As Fotopulos walked into the building he was standing in front, in the doorway (85). Fotopulos did not appear to be injured.

John Duba testified for appellee:

*No evidence of damage to the rear fenders of the Dodge truck although the fenders protrude beyond the body of the truck.* He did not know if the tailgate had been damaged in this accident although they replaced the tailgate and the rear taillight lens (73).

On cross-examination he stated: He examined the Dodge truck and found that the frame members of it had been so badly corroded that it was paper thin; that heavy metal had been placed on the floor of the body of the truck and that when the frame buckled, the extra weight of this metal plate caused damage to the cab and broke the motor support. The gas tank, because of the corrosion, had to be replaced but it had nothing to do with the accident. The whole chassis was badly corroded (74). Most of the damages and repairs



were caused by the corrosion. The only damages he could find that could have been caused by the accident were the damages to the tailgate and the hinges of the rear tailgate (75). The Court will notice that the damages were so slight that no claim for damages to the vehicle was claimed or proven.

It is submitted, as a matter of law, that the trial Court should, in view of the testimony, find that Fotopulos was guilty of, at least, contributory negligence, and when the slightest contributory negligence is shown, that the appellee, as a matter of law, cannot recover.

“The plaintiff is held not to be entitled to recovery if he was ‘guilty of contributory negligence, *however slight*’, even though the defendant may have been ‘most to blame’.

“Any negligence on the part of the plaintiff which contributes even in a *slight degree* to the accident is contributory negligence, barring a recovery; and it is error for the Court not to instruct the jury to such effect”.

2 *Cal. Jur. Supp.* 170, referring to

*Markham v. Hancock Oil Co.*, 2 C.A. (2d) 392, 37 Pac. (2d) 1087, and other cases.

In

*Texas Co. v. Hood, et al.*, 161 Fed. Rep. 2d Series 618 (CCA-5).

(which was a somewhat similar case in which a truck and plaintiff's auto collided and the plaintiff's husband was killed, the only eye witnesses being that of defendants), the Court said (620):

“The circumstances sought to be shown by plaintiff, even if all were admitted to be proven, are entirely consistent with the positive, uncontradicted and unimpeached testimony of the three eye witnesses as to how the collision occurred, where two equally justifiable inferences may be drawn from the facts proven, one for and one against the plaintiff, neither is proven and the verdict must be against him who had the burden of proof \* \* \*. Moreover, where the plaintiff’s right of recovery depends upon the existence of a particular fact being inferred from proven facts, such inference is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses whose testimony is consistent with the facts actually proven and which uncontradicted evidence shows affirmatively that the facts sought to be proven did not exist \* \* \* no lawful finding can be made of its existence \* \* \*”

That if there is doubt as to whether the one party or the other was in a better situation to prevent the impact, the conclusion that both parties were responsible seems logical (See 2 Cal. Jur. Supp. 158).

A long line of decisions in California has established the rule that

“The failure of a person to perform a duty imposed upon him by law is negligence per se and if such negligence proximately contributes to his injury, he cannot recover”.

*Hardin v. Sutherland*, 106 C.A. 479 (289 P. 900).

The uncontradictory evidence shows that Fotopulos violated the law and that his violation proximately contributes to his injuries. The only material evidence of the appellee witnesses was the position of the vehicles after the accident and from their own testimony, after their rather casual inspection, they had been moved, as O'Neil testified, and were eight or nine feet apart.

Sec. 526 of the Vehicle Code of California, states as follows:

**“526. DRIVING ON ROADWAYS LANED FOR TRAFFIC.**

Whenever any roadway has been divided into three or more clearly marked lanes for traffic, the following rules in addition to all others consistent herewith shall apply:

(a) A Vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety”.

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**AS TO THE FINDING THAT PETER FOTOPULOS' DEATH  
WAS CAUSED BY THE COLLISION.**

It is apparent that not a very hard blow was struck by the impact of the two vehicles. Not even the fenders of Fotopulos' vehicle was damaged and the only damage to his vehicle was a possible broken tailgate. The only damages to the Government vehicle was a slight crease or scratch on its right front bumper.

It is believed that medical testimony, when analyzed, does not point to the impact as bringing into exist-

ence the matter which caused Mr. Fotopulos' death. Dr. Ryan gave a history of generalized peritonitis. The various medical reports tend to show Mr. Fotopulos' death was caused by a diverticulitis, that is, a protrusion of the mucosa through the walls of the large bowel, and that these perforate rather frequently. Dr. Ryan's opinion was that his death was the result of the condition of Mr. Fotopulos' bowel. There was no visible evidence of any blow or external injury.

Mr. Fotopulos was Dr. Wirtheim's patient. Fotopulos came to see him January 3, 1947. He said he had some kind of discomfort in his stomach. Dr. Wirtheim examined him. He had no symptoms of vomiting or peritoneal, no external injury which would make possible a rupture or a severe injury to the bowel. He had no fever. It was only a possibility that his death was caused by a blow on the abdomen.

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**THE COURT ERRED IN EXCLUDING EVIDENCE OF OTHER  
ACCIDENTS OR SICKNESS.**

The following question was excluded:

"Q. Mrs. Fotopulos, Mr. Fotopulos had two accident and sickness policies with the Occidental Life Insurance Company?

Mr. Bucher. I object to that, if the Court please. I can't see any relevancy between that question and this case as to whether he had any sickness or accident policies.

The Court. Sustained."

The question laid the foundation for showing that (if so) Mr. Fotopulos had received compensation for other sickness or accidents. It also went to the question of the amount of damages, for if the appellee had recovered from an Insurance Company, it could not recover from the Government.

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**THE COURT ERRED IN NOT FINDING HOW MUCH OF THE DISABILITY RESULTED FROM THE INJURY AND WHAT DISABILITY RESULTED FROM OTHER CAUSES.**

When the disability sustained is contributable both to injury and other causes, such as diseases, etc., the evidence must *make clear* how much of the disability proceeds from the injury in order for plaintiff to recover at all.

*McCormick on Damages* (1935) 273.

Appellant contends that the slight impact was not the sole cause of Fotopulos' death; that the trial Court should have found how it arrived at its conclusion that the impact was the sole cause and how it eliminated other causes that may have contributed to them.

---

**THE COURT ERRED IN AWARDING EXCESSIVE DAMAGES.**

Fotopulos was forty-nine years old. He had not paid any income tax before 1940. His average income from 1940 to 1943, inclusive, was approximately \$5700. Then during the war years (1943 to 1946) his average income jumped to approximately \$16,000, which is believed abnormal.

The Court is not bound by expectancy of life according to mortality tables.

*Harrison etc. v. Sutter Street Railway Co.*, 116 Cal. 156.

It would appear at Fotopulos would not have continued to earn as much as during the war years. His health and vigor and whether he would be continually employed are some circumstances to be considered. His death under the circumstances herein may be also noted. He had borrowed money on mortgages prior to the war years.

In

*Spell v. United States*, 72 Fed. Supp. 731, \$15,000 was awarded for the wrongful death of a motorist.

The damages in this case are limited to pecuniary loss and not for grief or mental suffering. Fotopulos' income tax statements were subject to the reduction for his expenses due to personal and maintenance charges to arrive at a net income for this case.

Dated, San Francisco, California,

May 2, 1949.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

*Attorney for Appellant.*

No. 12,066

IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

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UNITED STATES OF AMERICA,

*Appellant,*

VS.

DIAMOND FOTOPULOS and THOMAS FOTOPULOS and JOAN FOTOPULOS, minors,  
by and through their guardian ad  
litem, Diamond Fotopulos,

*Appellees.*

**BRIEF FOR APPELLEES.**

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FILED

MAY 11 1949

PAUL P. O'BRIEN





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No. 12,066

IN THE

**United States Court of Appeals  
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UNITED STATES OF AMERICA,

*Appellant,*

VS.

DIAMOND FOTOPULOS and THOMAS FOTOPULOS and JOAN FOTOPULOS, minors,  
by and through their guardian ad litem, Diamond Fotopulos,

*Appellees.*

**BRIEF FOR APPELLEES.**

---

**THE FACTS.**

On December 23, 1946 Peter Fotopulos, deceased, who was the husband and father of appellees, was driving his light Dodge truck north on Van Ness Avenue in San Francisco and as he approached the intersection of Van Ness Avenue and Bush Street, in the inner or westerly lane of traffic and next to and parallel to the street car tracks and safety zone he was following another car or truck that has never been identified. There are red and green signal lights at that intersection to regulate the traffic and at that in-

stant the red light was against traffic north and south on Van Ness Avenue and all such traffic was stopped. It was daylight and the streets were dry. After deceased halted behind the other car or truck, an army truck approached him from behind in the same lane of traffic, colliding with the rear of deceased's truck and forcing it against the car or truck in front of him. That car or truck, the first in the line, proceeded on its way as the green or go light flashed. Deceased's truck could not proceed. It was damaged both front and rear and buckled in the center and a tow car was called.

Peter Fotopulos, deceased, made no immediate complaint of physical injury to any one but did talk to the driver of the army truck and said that "the army would fix his truck for him." (Tr. 180.) This was testified to by Hammond, a witness for appellant.

Then the truck was towed away and deceased went home. He told his wife about the accident and stayed home the rest of the day. He complained of his stomach, could eat no solid foods, and attended to his business intermittently for about ten days, gradually growing worse until January 4, 1947 when he went to see Dr. Wertheim. No relief came to him and three days later Dr. Russell Ryan was called. Fotopulos entered the St. Francis Hospital, was operated on January 8th, and died on January 10th.

It was the opinion of Dr. Ryan, the attending and operating surgeon that deceased had received a blow in the abdomen on December 23, 1946, that a subse-

quent blood clot formed in one of the nutrient vessels of the colon wall and a necrosis followed causing death. We shall discuss the testimony of the medical witnesses later in this brief.

Deceased left surviving him his widow 29 years old and two children of the ages of 9 and 10 years. According to the stipulation between counsel (Tr. 253) the widow had no separate estate or income and the net earnings of deceased for the year 1946 was \$18,574.76.

Upon the trial without a jury before Hon. George B. Harris, District Judge, and after the case was submitted, the Court made oral findings for the record (Tr. 220, 221, 223) and concerning which we shall also later comment, and thereafter and following the taking of additional evidence regarding earnings of deceased, judgment was rendered against the defendant and appellant for \$50,000.00.

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### THE EVIDENCE.

We shall endeavor to follow, in order, the statement of points relied upon by appellant although they may better be summarized into three headings, namely:

1. Was appellant guilty of negligence free from contributory negligence of deceased?
2. Was the injury the cause of death?
3. Were the damages excessive?

## I.

**The Negligence.**

An army sergeant, Bailey, was driving the army truck and he had three occupants with him; a corporal and a private who were riding in the rear facing east and a female nurse riding on the seat with him and to his right.

The evidence of Bailey was presented to the Court by deposition and in that deposition he testified as follows:

Q. As you approached Bush Street did anything happen?

A. Yes, plenty.

Q. Will you state what happened?

A. Well I hit the back of another vehicle. Now I cannot give a definite description of it. It has been quite a while since then. (Tr. 127.)

Thereafter Bailey stated there was another truck ahead of him but he didn't pay much attention to it, that he was in the left lane and that deceased was in the right lane and cut from the right lane into the lane in front of him. (Tr. 128.)

He also stated he didn't notice the stop sign, that he didn't get that far before the other vehicle (deceased) cut in front of him. Thereafter he testified that he could not estimate the speed of the Dodge truck (deceased) because he *never saw the truck*. (Italics ours.) "You cannot see much from a side view of the car. By that time he was right in front of me." (Tr. 133.)

Then Bailey stated that the right front corner of the army truck struck the left rear corner of the Dodge truck. (Tr. 133.) Yet no damage was done to either of the rear fenders of the Dodge.

And thereafter, and this is more of Bailey's testimony, he stated as follows:

Q. I am asking you where the truck was when Mr. Fotopulos hit it after you hit Mr. Fotopulos, that is all I am asking you.

A. That would only commit me. (What he meant by that answer we cannot tell.) I do not know whether he hit the truck. He might have hit it before I hit him.

Q. You do not know what happened?

A. I do not know. I hit him, that is all I know. (Tr. 147.)

Further in his deposition Bailey stated it was impossible to see the stop lights on Van Ness Avenue and the stop light could not be seen because a lamp post obstructed the view. (Tr. 161.)

Regarding this stop light may we interrupt the testimony of Bailey for a moment to quote from the oral findings of the Court as follows:

"A significant factor in the whole case, as I view it, is the stop signal, and this Court has driven that particular area many, many times. It is perfectly apparent to the Court, and was at the time this accident took place, that that stop signal was perfectly visible, at least a block away. The driver's testimony that he could not see it, that it was screened by a street lamp, is not in accord with the facts." (Tr. 221.)

And Bailey, after struggling with statements and mis-statements finally says:

Q. You do not remember very much about this accident at all?

A. Truthfully, I do not. (Tr. 146.)

May we follow excerpts of Bailey's testimony with the deposition of the corporal, Hammond? He was riding in the rear on a seat lengthwise with the army truck and facing the east. He was so confounded in his evidence that, although offered by appellant, it resulted in greater favor for the appellees.

Hammond testified before the coroner on January 23, 1947, just thirteen days after the death of Fotopulos and in his deposition appears the following:

Q. Corporal, you testified before the county coroner in this case, didn't you?

A. Yes.

Q. On the 23rd of January, 1947?

A. Yes.

Q. You were sworn by the coroner there to testify and answer questions?

A. Yes.

\* \* \* \* \*

Q. Well could you see what happened in front of you?

A. I just looked over the cab and could see.

Q. And you saw his car pass you on which side?

A. On the *left side*. (Italics ours.) We were on the inside lane.

Q. Going north and he passed you on the left side of the army truck?

A. Yes. (Tr. 187, 188.)



Thereafter Hammond said he gave them (coroner) a statement but they could have "got it wrong" and "at the time this accident happened I never gave it a thought that anything was ever going to come up about it and just plumb forgot about it until about six months later I hear that he had died." (Tr. 189.) Yet Hammond had testified before the coroner thirteen days after Fotopulos died.

One more fact we desire to present about Hammond. And we again remind the Court that appellant contends that the army truck struck the left rear corner of the Dodge truck. But Hammond testified as follows:

Q. Then you struck him on the left rear end, did you?

A. Yes.

Q. And he was then on an angle looking toward the northwest, wasn't he?

A. Yes.

Q. And after you hit him you mean to say the position of the truck changed so he was then resting at an angle and looking toward the north east?

A. Yes. (Tr. 192, 193.)

He also testified that they stopped at the intersection of Bush and Van Ness for the red signal and that he was sure of that. (Tr. 184.)

Witnesses Harry A. Failor and Justin L. McNeil were in a store building on Van Ness directly opposite the collision. Failor testified they heard the crash and both of them ran out to see what happened.

A. As I got out there I noticed a Ford pickup truck in the pedestrian lane this side of the passenger zone and an army truck directly behind it.

Q. A Ford pickup truck?

A. A Ford pickup truck.

Q. Was that a Dodge?

A. Well, it could have been a Dodge as far as I know. It was a small pickup anyway.

Q. All right.

A. And the army truck was parked right behind it. \* \* \* The fellow said, "Well my brakes didn't hold", or "I couldn't help it."

Q. The man who was driving the army truck said that?

A. Army truck. (Tr. 78.)

Q. And directly behind it (referring to the diagram on the blackboard) you have placed the army truck and the two are in parallel, or one is exactly ahead of the other, is that correct?

A. That's right. (Tr. 79.)

Justin McNeil testified:

Q. But were the two cars in an absolutely straight line with each other or was either car on an angle?

A. No, they were both one behind the other. (Tr. 89.)

## II.

### The Cause of Death.

We shall not linger on this point any longer than to quote from the testimony of Dr. Russell Ryan and to remind the Court that he was the only surgeon who treated, who operated and who attended the autopsy. The evidence he gave is so direct and positive that we

fail to understand why appellant has raised this question at all. Dr. Ryan testified as follows:

A. My conclusion is that this patient, as he stated in his history, received a blow in the abdomen caused by striking the steering wheel in the accident. (Tr. 34.) That he had a subsequent clot form in one of the nutrient vessels of the wall of the colon, he had a necrosis following that and died as a result.

Q. In other words, then, is it your opinion from all of the facts you know about this case, that the original trauma on the 23rd of December was the proximate cause of the condition which you found on operation, and of his death?

A. Very definitely, yes.

Q. You have no doubt about it in your mind?

A. Not in my mind, there isn't any doubt. (Tr. 38.)

That practically concludes the medical testimony because while a couple of doctors testified for the appellant, they knew nothing about the case except from reading the medical reports and did not attempt to contradict the testimony of Dr. Ryan.

### III.

#### The Damages.

Fotopulos, at the time of his death, was 49 years of age and his life expectancy was then 23.36 years. (Stip. Tr. 252.) Plaintiff widow had no separate property or income other than community (same stip.). He was not employed but was in business for himself. His net income during the year preceding his death was

\$18,574.76. Considering such life expectancy, earning power and the widow and two minor children surviving him, the judgment of \$50,000.00 was reasonable and fair.

Before we close this part of our brief may we suggest that we are somewhat confused over the statements at the bottom of page 12 and the top of page 13 of appellant's brief. It quotes from the transcript and the testimony of Mrs. Fotopulos concerning our objection to a question by appellant as to whether deceased carried certain accident and sickness policies. Our objection was properly sustained. Appellant now claims, for the first time, that the question was asked to lay a foundation for showing that Fotopulos had other sicknesses or accidents. But the matter was not further pursued by appellant nor did appellant at any time, in any part of the trial, ever inquire into the condition of the health of deceased nor did it ever attempt to show that deceased was in other than perfect health.

Then appellant urges that such question went to the amount of damages, and alleges that if the widow or children had received any insurance benefits, they could not recover. Surely appellee does not intend that this Court should take this to be the law. But even aside from this, appellant and appellee stipulated that appellees had no income other than from their community and this rules out any indemnity from any insurance policies, accidental or otherwise.

## THE LAW.

## I.

## NEGLIGENCE.

We begin this section of our brief with a quotation from Section 1963 of the California Code of Civil Procedure on the question of presumptions. Subsection 4 of that section provides that the following presumption is satisfactory if uncontradicted: "That a person takes ordinary care of his own concerns," and this was quoted in a death case decided by our California Supreme Court in 1914, *Crabbe v. Mammoth Channel Gold Mining Co.*, 168 Cal. 500, 143 Pac. 714. In that case Mr. Justice Henshaw said:

"Where death is occasioned under circumstances such as this, without eye witnesses, the law comes to the aid of the plaintiff who is pressing a suit for damages for the death and that law is found in the Code of Civil Procedure."

"This is a controvertible presumption, it is true, but until controverted it is evidence in accordance with which the jury is bound to decide."

"Accordingly where personal injury or death is occasioned under circumstances which might import negligence, the presumption is that the one killed or injured did everything that a reasonably prudent person would have done under the circumstances for his own safety." 19 Cal. Jur. 703.

To the same effect are the decisions in the following cases:

*Little v. Yanagisawa*, 70 Cal. App. 303, 233 Pac. 357;

*Smellie v. Southern Pacific Co.*, 212 Cal. 540,  
299 Pac. 529;

*Donovan v. Security Bank*, 67 Cal. App. (2d)  
845, 155 Pac. (2d) 856.

But the question of contributory negligence upon which appellant so securely relies was not determined by a jury but by a Court. And that Court ruled out any negligence of deceased contributing toward the collision. Our California Court in *Ramsey v. Posini*, 108 Cal. App. 527, 291 Pac. 884, 886 held as follows:

“It is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury, an inference to be deduced from the circumstances of each particular case, and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury.” *Gregg v. Western Pac. R. R. Co.*, 193 Cal. 212, 225, 223 P. 553, 558.

In other words, even if a jury had decided against any contributory negligence, the Court would be slow in setting such verdict aside and much more weight is given to the decision of the Court than that of a jury.

Here we have a dispute of facts about the accident. But the evidence submitted by appellees was by disinterested witnesses, not prejudiced or biased, and it was their opinion and which the Court believed, that deceased was where he should have been at the time

and place of the accident and no act of his in any manner contributed to it.

Even if there had been some slight tangible evidence of negligence on the part of deceased, in jurisdictions in which the defendant bears the burden of proof as to contributory negligence, as in California, such burden may be satisfied by a preponderance of the evidence. *Diller v. Northern California Power Co.*, 162 Cal. 531, 123 Pac. 359.

“In such case the defendant may avail himself of any evidence supplied by the plaintiff on the issue. It is not, however, necessary to a recovery that it appear from all the evidence that the decedent was guilty of no negligence proximately contributing to the injury.” 16 American Juris. 223.

“In most jurisdictions, when plaintiff makes out a prima facie case of negligence and does not, by his pleading or evidence, disclose contributory negligence on the part of deceased, the burden is on defendant to show contributory negligence on the part of deceased as a matter of defense.” 17 Corpus Juris 1304-1305.

This is the well established California rule as set forth in

*Williams v. San Francisco and Northwestern Ry. Co.*, 6 Cal. App. 715, 93 Pac. 122;  
*Schneider v. Market St. Ry. Co.*, 134 Cal. 482,  
 66 Pac. 734.

“The fact that decedent cannot testify as to how the injury happened raises no presumption in favor of or against plaintiff in an action for his

death, but less evidence is required to establish freedom from contributory negligence on his part than if he were alive and able to testify." 17 Corpus Juris 1308.

As we have heretofore stated, a person is charged with the duty of exercising ordinary care for his own safety and a presumption exists that such care was so exercised. After all, it has been repeatedly held that the question of whether or not due care was exercised and whether or not negligence of the deceased contributed to the accident is always one for the jury or in the absence of a jury, it would be decided by the Court.

This doctrine is well set forth in the decision of the U. S. Circuit Court of Appeals for the Seventh Circuit in 1940 in *Stephenson v. Grand Trunk Western*, 110 Fed. (2d) 401-410. In the opinion in that case Mr. Justice Major quoted from a Michigan case, *Fairchild v. Detroit etc.*, 250 Mich. 252, 230 N.W. 167 in which the Court used these words:

"The presumption which prevails in the absence of testimony to the contrary that one accidentally killed was not guilty of contributory negligence is based on the common knowledge of mankind that one will ordinarily exercise such care as is requisite for his own safety."

We therefore respectfully urge the presumption that deceased was free from contributory negligence was not, in the opinion of the trial Court, overcome by sufficient evidence to deny the widow and children the right to recover for his death and such opinion should be sustained.



## II.

## THE DEATH WAS CAUSED BY THE INJURY.

No law can or should be cited upon this question. It is only a matter of the preponderance of the medical evidence and we refrain from indulging in a discussion of legal authorities upon a matter so elementary in its nature.

May we, for a moment, direct the Court's attention to such evidence, which, in our opinion, is overwhelming in support of our position.

Four doctors testified. One was called by the appellees and three by appellant. Of those three, one of them, Dr. Wertheim, was called by deceased on January 3, 1947, ten days after the accident. The patient gave a history to the doctor of the accident on December 23rd and told him he felt some kind of discomfort in his stomach. (Tr. 51.) The doctor advised rest and diet. That was all. And then counsel qualified the doctor as an expert and as such, and under direct examination by appellant the doctor testified as follows:

Q. Oh, I understand you. In other words, if there is no other cause for the perforation of the bowel, then it must have been caused by the accident.

A. Then it is more probable that it is caused by the accident. (Tr. 56.)

That was the testimony of the witness for appellant and we refrained from any cross-examination.

The two other doctors called by appellant were strangers to the case and based their opinions from

a reading of the medical pathological and autopsy reports. But Dr. Casper, who thought the man might have died from a carcinoma or diverticulum, finally did admit that in the absence of any such findings in the medical and other reports, the trauma might have been the cause of the death (Tr. 66) and Dr. Crahan, also for the appellant, testified on direct examination that there was no evidence of either cancer or diverticulitis and as follows:

Q. Doctor, if the death was caused as indicated in this report, would that have been caused by a body—I mean by a person striking the upper part of his abdomen against a steering wheel?

A. I couldn't say that. It might be the result of trauma. Is that what you are trying to ascertain? (Tr. 69.)

And again we did not cross examine.

We have already quoted from the testimony of Dr. Ryan and the evidence he gave was in full detail. The Court will note, without our repeating at length, that he fully described every condition he found, his tentative diagnosis before operation and just what he discovered after such operation. This was followed by the pathological examination and the autopsy, both of which fully sustained Dr. Ryan in his later and more complete diagnosis and his opinion of the cause of death. That opinion was direct, unequivocal and positive. It left no question of a doubt. Deceased sustained an injury on December 23, 1946, a blow on the abdomen, he had a subsequent clot form in one of the blood vessels of the colon, a necrosis followed and he died as a result. (Tr. 38.) No more need be said

concerning the medical testimony and the cause of death. There was no conflict.

---

### III.

#### THE JUDGMENT WAS NOT EXCESSIVE.

At the outset may we again repeat to this Court that no question of passion or prejudice enters this case because there was no jury. Nor was any damage allowed for grief or mental suffering, and we fail to understand why appellant has injected that fact in its brief because there was no evidence and not one word in the entire trial touching upon that point. Of course the damages are limited to pecuniary loss and we fully agree with appellant. And we also agree that the Court is not bound by expectancy of life according to mortality tables. But such tables are admissible—as an aid to the Court and were admitted for just that purpose. *Gallentino v. Fierro*, 294 Pac. 59.

On the last page of appellant's brief it says something about his health and vigor and his being continually employed. Why does appellant mention employment? Deceased was never employed, not for many years prior to his death. He was an employer, not an employee and he was "in good health and vigor" (quoting from such last page of the opening brief.) Not one word of testimony indicated the contrary. His health was not even inquired into and in the absence of any contrary evidence the Court was bound to assume he was in good health.

Upon the question of the amount of the judgment can it be honestly urged that, in these days of higher costs, that such judgment was excessive considering the fact that deceased had a life expectancy of 23 years, that he was earning around \$15,000 a year net and that he left a widow and two small children? Any number of California decisions sustain our judgment. For instance in *Krause v. Rarity*, 293 Pac. 62, a judgment of \$35,000 for the death of a man 42 years old who earned, not \$15,000 a year but about \$3,600 a year, was held not excessive and that was in 1930, long before the cost of living had advanced.

And in 1947 this Court sustained a judgment for \$20,000 for one child only, the parents having been divorced, and the deceased parent earned but \$300 a month. *Southern Pacific Co. v. Zehnle*, 163 Fed. (2d) 453.

In that case Mr. Justice Denman said:

“With regard to the amount to be awarded for such loss of society and comfort, in a recent case, in the reverse situation where the parents lost the society and comfort of their infant child ten months of age, the court sustained a jury award of \$15,000. *Couch v. Pacific Gas & Electric Co.*, 80 Cal. App. (2d) 183 P. (2d) 91. There as in all such cases, the jury was entitled to consider, as it did, the century’s continued depreciation of the purchasing value of the dollar, with the extraordinary acceleration of the rate of decrease of the past decade. In California, such depreciation of the purchasing value of the dollar was recognized as a matter for the jury’s consideration as early as 1928. *O’Meara v. Haiden*, 204 Cal. 354,

367, 268 P. 334, 60 A.L.R. 1381. \* \* \* We recognize, as does the California law, the important part of the trial judge in determining a contention of excessive damages raised as here on motion for a new trial, which was denied. In *Bond v. United Railroads*, 159 Cal. 270, 285, 113 P. 366, 48 L.R.A. N.S. 687, Ann. Cas. 1912C, 50, the California Supreme Court said that the remedy for excessive verdicts 'is practically committed entirely to the judge who presides at the trial in the court below' and that the power of appellate courts over damages 'exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury'. See *Hale v. San Bernardino, etc. Co.*, 156 Cal. 713, 716, 106 P. 83; *Wheaton v. North Beach, etc., Co.*, 36 Cal. 590, 591. Practically, the trial court must bear the whole responsibility in every case."

---

### CONCLUSION.

The accident out of which grew the claim of appellees resulted from the negligence of an employee of appellant, and no contributory negligence of deceased was involved. The judgment of the District Court upon the proof of negligence is proper and should be confirmed.

Death resulted from the blow on the abdomen suffered by decedent in the accident brought about by the negligence of appellant's employee. The evidence traced the cause of death from that blow through succeeding days of disability and suffering, through

necessary surgery and to the fatal outcome in decedent's death. The complete chain of events proved by appellees is continuous and unbroken and carries the cause of death directly back to the employee's negligence. In this particular the opinion of the trial judge is clear, positive, certain and judicious.

Nor may it with propriety be contended that the amount of damages which the judgment awarded appellees is excessive. No passion or prejudice entered into the trial or judgment in this cause to bring out an award of excessive damages. No question may be raised of an unduly influenced or excited jury. The cause was tried by the judge sitting without a jury. The trial was objective and impersonal. The Court was in a position and competent to properly evaluate the evidence as to the amount which would compensate the appellees for the loss of their husband and father. The amount awarded was determined by computation based on decedent's normal expectancy of life, his earning power and his surviving widow and children. The amount finally fixed and awarded is reasonable, is fair and is in accordance with the evidence and the facts.

It is respectfully submitted that the judgment of the District Court should be sustained.

Dated, San Francisco, California,

May 9, 1949.

CARROLL S. BUCHER,

*Attorney for Appellees.*

No. 12,066

IN THE

United States Court of Appeals  
For the Ninth Circuit

---

UNITED STATES OF AMERICA,  
*Appellant,*

VS.

DIAMOND FOTOPULOS and THOMAS FOTOPULOS and JOAN FOTOPULOS, minors,  
by and through their guardian ad  
litem, Diamond Fotopulos,  
*Appellees.*

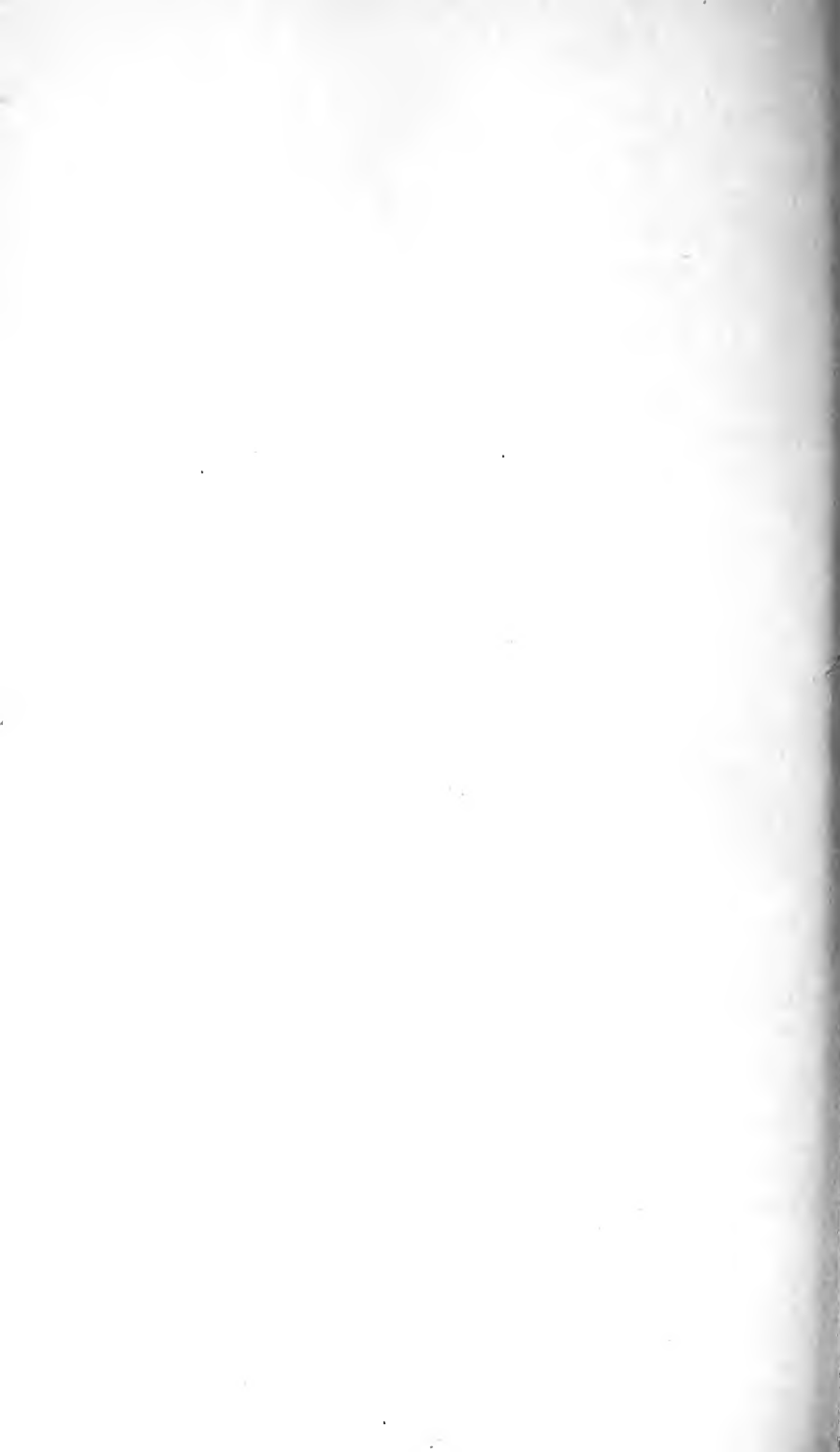
REPLY BRIEF FOR APPELLANT.

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FRANK J. HENNESSY,  
United States Attorney,  
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*Attorney for Appellant.*

FILED

AUG 26 1949





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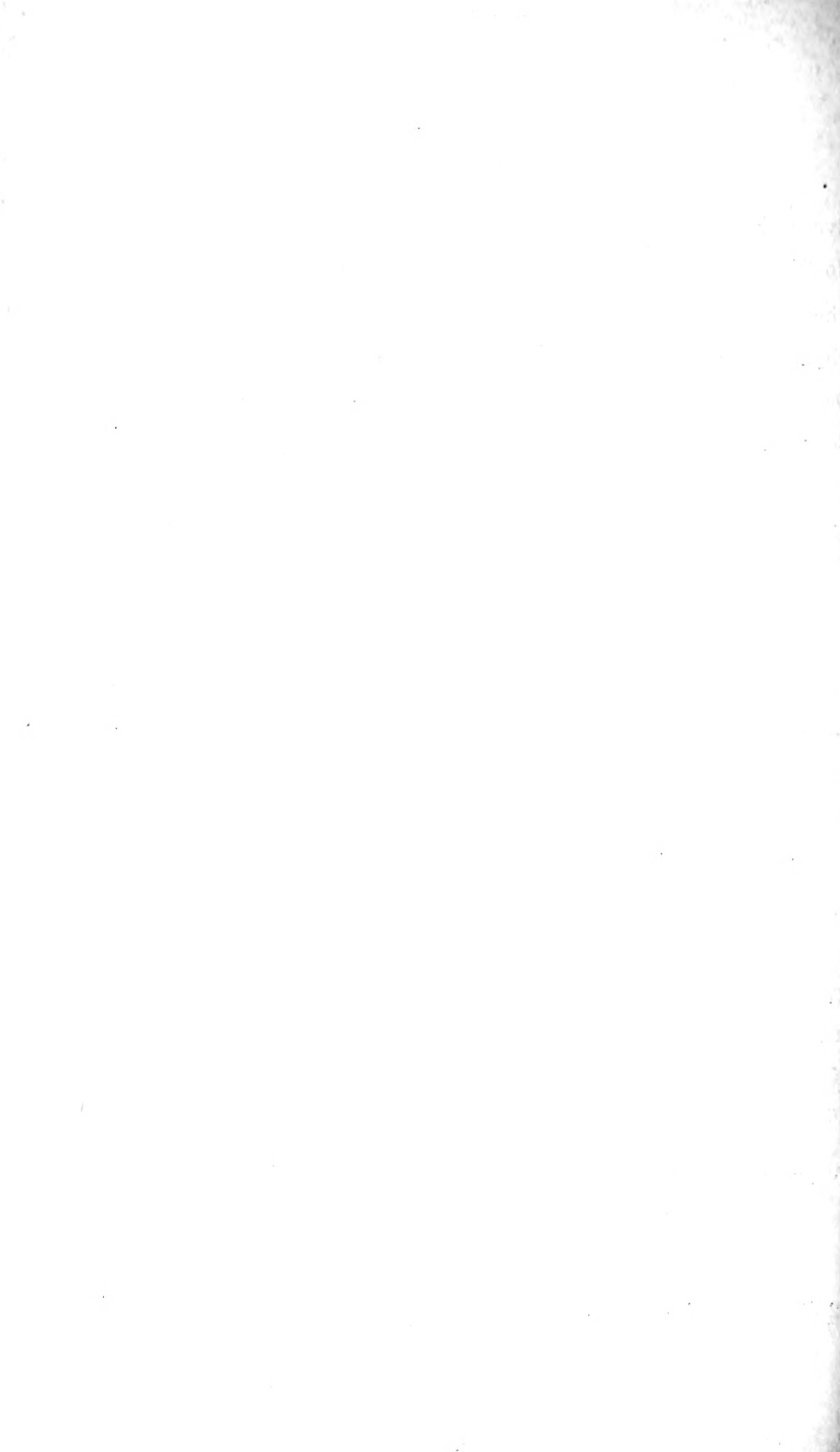
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IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

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UNITED STATES OF AMERICA,  
*Appellant,*

vs.

DIAMOND FOTOPULOS and THOMAS FOTOPULOS and JOAN FOTOPULOS, minors,  
by and through their guardian ad  
litem, Diamond Fotopulos,  
*Appellees.*

---

**REPLY BRIEF FOR APPELLANT.**

---

**EVALUATION OF EVIDENCE.**

(1) Where the evidence is in the form of depositions an Appellate Court is as capable of evaluating such evidence as a trial Court. As the Government driver was not available for trial except through his deposition, this Court may construe his testimony with the same force and effect as the trial Court.

*Societe Suisse Pour Valeurs De Metaux v. Cummings*, 99 F. (2d) 387, 391 (C.A. D.C.)

(2) Where there is not any substantial conflict in the evidence on the issue of negligence, and where the

facts point to but one inference, the lower Court is not free to adopt another inference. See

*Wilmot v. Golden Gate Investment Co.*, 41 Cal.

App. (2d) 664, 668, 107 P. (2d) 263;

*Crawford v. Southern Pacific Railway*, 3 Cal.

App. (2d) 427, 45 P. (2d) 183.

In this connection it is the Government's contention that the evidence in the instant case conclusively points to the deceased's contributory negligence, and if guilty of the slightest contributory negligence, appellees cannot recover, as a matter of law. (See Appellant's Opening Brief, p. 9).

(3) Inferences are not species of fact or evidence, but deductions from facts. The findings of the trial Court were, we believe, based on inferences not supported by the facts. Perhaps a cogent example of inferences without being based on testimony or presumptions is the direct quotation of appellees in their brief on page 5, which apparently was relied upon by the appellees and the trial Court in sustaining the findings. The Court stated as follows:

“A significant factor in the whole case, as I view it, is the stop signal, and this Court has driven that particular area many, many times. It is perfectly apparent to the Court \* \* \* that the stop signal was perfectly visible at least a block away \* \* \*”

First, we do not view the stop signal as being in any way the cause of the accident, and particularly significant in this case.

Secondly we doubt that the testimony supports this.

(a) Appellees' witness, Harry A Failor, was asked if the stop and go signal could be seen by a driver of an automobile as it approached Bush Street. The answer was—

“A. It all depends as to whether there is a street car in line of vision or not.

Q. If there is no street car in line of vision, can you see it?

A. I am not positive but I believe you can.”

It may also be noted that Failor did not know that the red light was on at the time (R.T. 79).

The testimony of the Government driver Bailey was as follows (R.T. 129):

“Q. As you approached Bush Street, what was the condition of the stop sign?

A. I did not notice the stop sign. I did not get that far before this other vehicle cut in front of me. At that time all I thought of was stopping, anyway.”

Still further on he testified (R.T. 161) that the signal was visible for at least one-third of the block before reaching Bush Street.

We think that the Court will take judicial notice of the fact that these stop signals are constructed with a view that they will be seen at least forty feet from the intersection. The Court apparently assumed, without supporting facts, that Bailey should have seen the

stop signal at least a block away, and apparently it was significant in his decision.

---

### NO SIGNAL BY FOTOPULOS.

Even if it is assumed that an inference can be taken from the testimony of appellees' witness (who did not see the accident) that Fotopulos stopped his truck while in front of the Government vehicle, yet the undisputed testimony shows that Fotopulos gave no signal at any time (R.T. 121). It is believed that under the circumstances of this case it would constitute contributory negligence and hence no recovery.

---

### THE BURDEN OF PROOF IS ON APPELLEE.

#### Appellee

"In order to recover, *must* be able to *prove* that the defendant *did some act* without which the collision would not have occurred \* \* \* he must demonstrate that defendant was enabled to *foresee* or *know* of the danger of his conduct \* \* \*" (Italics ours).

(2 Cal. Jur. (10-Yr. Supp.) p. 460, citing previous authorities).

*Mazgedian v. Swift & Co.*, 22 C.A. (2d) 570, 71 Pac. (2d) 833;

See:

*Collins v. Hodgson*, 42 Pac. (2d) 700, 702.

*Commercial Transfer, Inc. v. Daigh & Stewart*, 33 C.A. (2d) 370, 91 Pac. (2d) 951.

**PHYSICAL FACTS.**

It would appear that the physical facts, to-wit: that the only contact was the right front bumper of the Government vehicle against the left rear of Fotopulos' truck, could only be reasonably explained by Fotopulos cutting in. In considering this point, the only direct testimony is that Fotopulos did cut in front of the Government truck. The cutting in of Fotopulos' vehicle certainly would make such a contact, and if, as contended by appellees, the two trucks involved in the accident were directly parallel (Appellees' brief p. 8), the damage would be otherwise. It will be noted that appellees' own witness testified that no repairs were made to the fenders of Fotopulos' truck, yet the fenders extend beyond the body (R.T. 73); that the only damage caused by the blow was the tail gate (R.T. 75), which was on Fotopulos' left side. If the contact were directly behind, both fenders would have been dented.

The testimony of Failor that "I heard the Government driver say 'Well, my brakes didn't hold', or 'I couldn't help it' " (Appellees' brief p. 8) is vague, indefinite, and possibly an attempt to bolster the appellees' case. As he later states, on cross-examination, that he walked between cars parked at the curb to the place of the accident (R.T. 84) and that when Fotopulos came to his place of business to use the telephone, he was standing in the front doorway. It seems to us from all the evidence that this was an inaccurate statement at best. It was denied, of course (R.T. 135), and it further appears from the testimony that

the brakes were in A1 condition (R.T. 154). Failor further testified that Jud McNeil might have been with him, (R.T. 80), yet McNeil made no corroboration. It would appear that Failor and McNeil apparently did not go to the place of the accident (R.T. 155).

---

### **DEATH CAUSED BY INJURY.**

In view of the very slight contact, the activity of Mr. Fotopulos after the accident, his lack of complaints, no immediate symptoms of injury (R.T. 59), and all the facts as a whole, it is believed that the contact was not such an exercise of a positive influence as to bring into existence the cause of his death.

Dr. Ryan, upon whom appellees rely to establish that Fotopulos' death was caused by the slight impact, took the hearsay statement of Fotopulos (R.T. 39) that he suffered a severe enough blow from the impact of the steering gear against his upper abdomen to base his diagnosis that it was the cause of his death. We think that the pathology shows that if there was any blow, it was in the lower quadrant and hence would not come from a blow against the steering gear.

Dr. Ryan testified that Fotopulos told him he suffered considerable pain at the time of the accident (R.T. 34) but the evidence is to the contrary. (R.T. 135; R.T. 180).



**CONCLUSION.**

There has not, it is believed, been shown any evidence that can be translated into negligence of the Government, but on the contrary, that Fotopulos was guilty of contributory negligence, and therefore the judgment should be reversed.

*Gaston v. Hisashi Tsuruda* (Cal. App.), 43 Pac.  
(2d) 355, 357.

Dated, San Francisco, California,  
August 25, 1949.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

*Attorney for Appellant.*



No. 12068

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United States  
Court of Appeals  
for the Ninth Circuit

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FRANK M. SIEGMUND,

Appellant,

vs.

GENERAL COMMODITIES CORPORATION,  
LIMITED, WM. H. HEEN, ERNEST K. KAI  
and THELMA M. AKANA,

Appellees.

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Transcript of Record

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Appeal from the United States District Court  
for the District of Arizona

FILED  
NOV 29 1948

PAUL P. O'BRIEN,  
CLERK



No. 12068

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United States  
Court of Appeals  
for the Ninth Circuit

---

FRANK M. SIEGMUND,

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Appeal from the United States District Court  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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\* Page numbering appearing at foot of page of original  
certified Transcript of Record.

In the District Court of the United States  
for the District of Arizona

Civil No. 1142-Phx.

FRANK M. SIEGMUND,

Plaintiff,

vs.

GENERAL COMMODITIES CORPORATION,  
LIMITED, an Hawaiian corporation, W. T.  
DAVIS, also known as W. THOMAS DAVIS,  
THE BLACK CORPORATION, THE  
WHITE CORPORATION, WM. H. HEEN,  
ERNEST K. KAI, and THELMA M. AKANA,  
Defendants.

### COMPLAINT

Comes now the Plaintiff and for his First Cause  
of Action against the Defendants alleges as follows:

#### I.

That Plaintiff, Frank Siegmund, is a resident of  
Maricopa County, Arizona, and a citizen of the  
State of Arizona, that the Defendant General Com-  
modities Corporation, Limited, is a corporation  
duly organized and existing under and by virtue of  
the Laws of the Territory of Hawaii and is a citi-  
zen of said Territory; that said corporation has  
been continuously and now is doing a substantial  
portion of its business in the State of Arizona; that  
Plaintiff is credibly informed and believes and,  
therefore, alleges upon such information and belief  
that the Defendant W. T. Davis, also known as W.

Thomas Davis, is a resident and a citizen of the State of California and that the said Defendant W. T. Davis, also known as W. Thomas Davis, is not a resident nor a citizen of the State of Arizona; that Plaintiff is credibly informed and believes and, therefore, alleges upon such information and belief that the Defendants The Black Corporation and The White Corporation are non-resident and foreign corporations [4] and that said corporations are not organized under and by virtue of the Laws of Arizona nor do they maintain a regular place of business within the State of Arizona; that the true names of the Defendants sued herein as The Black Corporation and The White Corporation are to Plaintiff unknown and Plaintiff prays to be allowed to substitute their true names if the same should become known. The Plaintiff further alleges that the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars.

## II.

That on or about the 28th day of August, 1947, Plaintiff entered into a Contract in writing with the Defendant, General Commodities Corporation, Limited, which said Contract is in words and figures as follows:

### “AGREEMENT”

“This Agreement entered into this 28th day of August, 1947, between General Commodities Corporation, Ltd., a Hawaiian Corporation, by Mr. W. Thomas Davis, its Vice President and Executive

Director, their assignees, and specifically including a subsidiary Guamanian Corporation to be organized and controlled by the aforementioned General Commodities Corporation, Ltd., to be referred to in this agreement as parties of the first part, and Frank M. Siegmund of Phoenix, Arizona, an individual referred to in this agreement as party of the second part.

“It is understood and agreed that the parties of the first part are now engaged in and attempting to purchase and/or arrange for the purchase of certain items and/or commodities generally construed to be War Surplus from the Republic of China and its agencies for the purpose of resale and/or to negotiate the purchase of War Surplus items and/or commodities for a third party whomever it may be.

“It is understood and agreed that the parties of the first part desire to and do hereby employ the party of the second part as their exclusive sales representative in the United States of America for any and all the aforementioned *itmes* and/or commodities purchased or for which they, or their authorized representatives have arranged or negotiated the purchase of by a third party from the Republic of China or any of its agencies.

“It is further understood and agreed that the party of the second part shall assemble a competent sales organization under his supervision in order to aggressively offer for sale all items and/or commodities for which the parties of the first part have purchased and/or negotiated the purchase of from the Republic of China.

“It is further understood and agreed that the parties of the first part shall keep the party of the second part [5] fully informed as to what items and/or commodities they have acquired for resale, together with complete description and selling price and/or actual cost of items and/or commodities; and party of the second part agrees to abide by the terms and conditions of sale as instructed by party of the first part.

“It is further understood and agreed that parties of the first part shall pay to the party of the second part within ten days after receipt of payment from purchaser of any and all items and/or commodities acquired from or for which the party of the first part or their authorized agents have negotiated the purchase of by a third party from the Republic of China or its agencies, the sum of twenty percent of the net profits of each individual sale or transaction as a selling commission.

“It is further understood and agreed that the term ‘net profits’ shall be construed to mean such profit as may remain in each individual sale after deduction by parties of the first part of necessary travelling and/or miscellaneous expenses used to acquire the items and/or commodities sold and/or for which the parties of the first part or their authorized agents have negotiated the sale of to a third party, and such deductions shall not include any salaries and/or other fixed overhead charges by the parties of the first part.

“It is further understood and agreed that the aforementioned twenty percent (20%) shall be considered as payment in full for services rendered to

parties of the first part by party of the second part in selling and/or disposing of any and all merchandise acquired by and/or negotiated for by parties of the first part or their authorized agents.

“It is further understood and agreed that if the parties of the first part, their assignees or authorized agents deem it advisable to organize a new corporation with offices and headquarters on Guam, Marianas Islands, for reasons best known to them for the purpose of purchasing and/or negotiating the purchase of by their authorized agents for a third party of War Surplus Materials from the Republic of China or its agencies, that this agreement shall become part of and incorporated in the by-laws of this new subsidiary corporation.

“It is understood and agreed that this agreement shall remain in full, force and effect for a period of one year from date first mentioned above and is automatically extended beyond that period unless terminated and cancelled by written notice sent by registered mail thirty days prior to date of cancellation, by either party of this agreement.

“In Witness Whereof, the parties hereto have executed this agreement the day and year first mentioned above.

“GENERAL COMMODITIES  
CORPORATION, LTD.

By /s/ W. T. DAVIS,

Its Vice President

/s/ FRANK M. SIEGMUND,

An Individual

Witness: B. H. Holmes (Signed)”



### III.

That the said Contract hereinabove referred to was executed by Defendant General Commodities Corporation, Limited, by and through the Defendant W. T. Davis, also known as W. Thomas Davis. [6] its Vice President and Executive Director; that at the time of the execution of said Contract the said W. T. Davis, also known as W. Thomas Davis, was the duly appointed and acting Vice President and Executive Director of the Defendant General Commodities Corporation, Limited, and duly authorized to enter into said Contract for and on behalf of said Defendant General Commodities Corporation, Limited.

### IV.

That pursuant to said Contract hereinabove referred to, Plaintiff in good faith entered into the performance of his obligations under said Contract and has since that date fully performed all of his obligations under said contract by him to be performed and has assembled a competent sales organization under his supervision and has aggressively offered for sale all items and/or commodities for which the Defendants and each of them have purchased and/or negotiated the purchase from the Republic of China; that Plaintiff pursuant to and in reliance upon said Contract has secured numerous purchasers for the commodities referred to in said Contract and negotiated for the sale of said commodities and that as a result of said negotiations by and efforts of the Plaintiff, large quantities of said commodities have been and are being

purchased from the Defendant General Commodities Corporation, Limited, and pay for the same has been made or has been arranged for to the satisfaction of said Defendant General Commodities Corporation, Limited, and that such payment is duly secured; that as the result of the efforts of Plaintiff, *numeous* prospective purchasers have been interested in the purchase of the commodities referred to in said contract and Plaintiff alleges that contracts for the sale of such commodities by Defendant General Commodities Corporation, Limited, to such *prosepective* purchasers are being negotiated and will be negotiated in the future as a result of the efforts [7] of Plaintiff; that as the result of the efforts of Plaintiff, Defendant General Commodities Corporation, Limited, has received substantial net profits from the sale of said commodities and that more than ten (10) days has elapsed since the receipt by said Defendant General Commodities Corporation, Limited, of such substantial net profits;

#### V.

That despite the Agreements and Covenants of Defendant General Commodities Corporation, Limited contained in said Contract, said Defendant General Commodities Corporation, Limited, has failed and refused upon demand by Plaintiff to disclose to Plaintiff the amounts received from said sales and the net profits derived from said sales and has failed and refused upon demand by Plaintiff to account to Plaintiff for such receipts and net profits and has failed and refused upon demand

by Plaintiff to pay to Plaintiff all or any portion of the commissions based on net profits received as set forth in said Contract to be paid to Plaintiff; that said demands by Plaintiff were made more than ten (10) days subsequent to the receipt of payments from purchasers by Defendant General Commodities Corporation, Limited;

VI.

That Defendant General Commodities Corporation, Limited, by its duly authorized officers has informed Plaintiff that it will continue to refuse to carry out the terms of said Contract; that Plaintiff is credibly informed and believes and, therefore, alleges upon such information and belief that twenty percent of the net profits to Defendants General Commodities Corporation, Limited, The Black Corporation and The White Corporation will be the sum of Two Million Dollars or in excess thereof. That by reason of the refusal of said Defendants to comply with their obligations under said contract, Plaintiff is damaged in [8] the amount of Two Million Dollars.

VII.

That Plaintiff has no knowledge whether the Defendant General Commodities Corporation, Limited, has organized any new subsidiary corporations in accordance with the terms of the written contract as aforesaid; that the names, The Black Corporation and The White Corporation hereinbefore referred to are designations for such new corporations or substitute corporations if the same have in fact been organized.

## VIII.

That full and complete records of said sales as aforesaid and the amounts paid by the Purchasers to said Defendant General Commodities Corporation, Limited, and to Defendants The Black Corporation and The White Corporation, and the net profits received therefrom are in the custody and control of said Defendants General Commodities Corporation, Limited, The Black Corporation, and The White Corporation; That Plaintiff does not have said records or copies thereof from which the amounts of his commissions, calculated as provided in said contract, could be determined.

## IX.

That Plaintiff is credibly informed and believes and, therefore, alleges upon such information and belief that the monies and the net profits heretofore received and to be received by Defendants General Commodities Corporation, Limited, The Black Corporation, and The White Corporation constitute the principal assets of said corporations and that said monies and net profits so received and to be received are being dissipated or will be dissipated by said Defendants General Commodities Corporation, Limited, The Black Corporation, and The White Corporation unless a Receiver is appointed by this Court to take charge of said monies and net profits of said Defendants and to preserve the [9] same pending Judgment herein; that Plaintiff is credibly informed and believes that substantial sums of money, letters of credit, and substantial portions of the net profit of Defendants General Commodities

Corporation, Limited, The Black Corporation and The White Corporation, are within the jurisdiction of this Court and are on deposit and held by the Valley National Bank at Phoenix, Arizona, and that unless a Receiver is appointed by this Court to take charge of and preserve said assets now within the jurisdiction of this Court, the same will be removed by the Defendants General Commodities Corporation, Limited, The Black Corporation, and The White Corporation from the jurisdiction of this Court.

Wherefore, Plaintiff prays Judgment against the Defendants and each of them that an account be taken of all the dealings and transactions in respect to said Contract in this First Cause of Action set forth and of the monies and net profits received by the Defendants General Commodities Corporation, Limited, The Black Corporation, and The White Corporation, and that the rights and duties of the Plaintiff and the said Defendants General Commodities Corporation, Limited, The Black Corporation, and The White Corporation in respect to said Written Contract in this First Cause of Action set forth, be Adjudged, Declared, and Determined by the Court; that a Receiver be immediately appointed by this Honorable Court to take charge of all monies, letters of credit, and net profits of the General Commodities Corporation, Limited, The Black Corporation, and The White Corporation, together with all books, accounts, and documents of every kind and description connected with said business, that the said Receiver take possession of

said monies, letters of credit and net profits of the said Defendants General Commodities Corporation, Limited, The Black Corporation, and The White Corporation, subject to the direction of this Court [10] and that he hold all said proceeds subject to the future Orders of this Court; that Plaintiff have Judgment for the specific performance of the Contract above set forth in Paragraph II; that Plaintiff have damages against the Defendants and each of them in the amount of Two Millior Dollars; that Plaintiff have his costs herein incurred; and for such other and further relief as to the Court may seem just and proper.

JAMES L. DeSOUZA and  
JOHN F. SULLIVAN,

By JAMES L. DeSOUZA,  
Attorneys for Plaintiff.

## SECOND CAUSE OF ACTION

Comes now the Plaintiff and for his Second Cause of Action against the Defendants alleges as follows:

### I.

Plaintiff re-pleads all of the allegations contained in Paragraph I of his First Cause of Action to which reference is hereby made and the same are hereby incorporated and referred to in this Cause of Action and made a part hereof as though the same were again fully set forth.

II.

That the Defendants Wm. H. Heen, Ernest K. Kai, and Thelma M. Akana, are residents of the Territory of Hawaii and citizens of Hawaii and that said Defendants are not residents of the State of Arizona nor citizens of the State of Arizona.

III.

Plaintiff re-pleads all of the allegations contained in Paragraphs II, III, IV, V, VI and IX of his First Cause of Action to which reference is hereby made and the same are hereby incorporated and referred to in this Cause of Action and made a part [11] hereof as though the same were again fully set forth.

IV.

That Plaintiff is credibly informed and believes and, therefore alleges upon such information and belief that the Defendant General Commodities Corporation, Limited, is a corporation formed by the Defendants W. T. Davis, also known as W. Thomas Davis, Wm. H. Heen, Ernest K. Kai, and Thelma M. Akana, for the express purpose of entering into and carrying out the transactions referred to in the Contract hereinabove set forth and that upon the completion of said transactions, said Corporation will be dissolved and will divest itself of all of its assets and that such dissolution will occur prior to Judgment in this Action; that Plaintiff is credibly informed further and believes and, therefore, alleges upon such information and belief that the Defendant General Commodities Corporation,

Limited, has distributed substantial portions of its net profits including all of its net profits on several of the transactions referred to in the Contract hereinabove set forth to the Defendants W. T. Davis, also known as W. Thomas Davis, Wm. H. Heen, Ernest K. Kai, and Thelma M. Akana, and that the future distribution of all of its net profits will be made to the Defendants W. T. Davis, also known as W. Thomas Davis, Wm. H. Heen, Ernest K. Kai, and Thelma M. Akana; that Plaintiff is further credibly informed and believes and, therefore, alleges upon such information and belief that said distribution of net profits by Defendant General Commodities Corporation, Limited, in this Paragraph above set forth, made heretofore and to be *make* in the future, are for the express purpose of defrauding the Plaintiff and preventing the Plaintiff from recovering from said General Commodities Corporation, Limited, the payments provided in said contract to be paid to Plaintiff and circumventing the rights of Plaintiff under said Contract. [12]

## V.

That Plaintiff is credibly informed and believes and, therefore, alleges upon such information and belief that the Defendants General Commodities Corporation, Limited, W. T. Davis, also known as W. Thomas Davis, Wm. H. Heen, Ernest K. Kai, and Thelma M. Akana have engaged in and are engaging in a conspiracy to defraud the Plaintiff or his rights and the payment due him under and



by virtue of the contract hereinabove set forth by causing the net profits of said General Commodities Corporation, Limited, to be distributed to Defendants W. T. Davis, also known as W. Thomas Davis, Wm. H. Heen, Ernest K. Kai, and Thelma M. Akana, and that pursuant to said conspiracy the Defendant General Commodities Corporation Limited, W. T. Davis, also known as W. Thomas Davis, Wm. H. Heen, Ernest K. Kai, and Thelma M. Akana, have caused substantial portions of the net profits of said General Commodities Corporation, Limited, including all of the net profits of said corporation from several of the transactions referred to in said Contract hereinabove set forth to be distributed to the Defendants W. T. Davis, also known as W. Thomas Davis, Wm. H. Heen, Ernest K. Kai, and Thelma M. Akana.

VI.

That the Officers of the Defendant General Commodities Corporation, Limited, are Wm. H. Heen, President, W. Thomas Davis, Executive Vice President, Ernest K. Kai, Treasurer, and Thelma M. Akana, Secretary.

That by reason of the distribution of the net profits and by reason of the conspiracy and unlawful acts of the Defendants aforesaid, the Plaintiff has been damaged in the sum of Two Million Dollars;

Wherefore, Plaintiff prays Judgment against the Defendants, General Commodities Corporation, Limited, W. T. Davis, also known as W. Thomas Davis, Ernest K. Kai, Wm. H. Heen, and Thelma

M. Akana, and each of them for Two Million Dollars damages, costs of suit herein incurred, and for such other and further relief as to the Court may seem just and proper.

JAMES L. DeSOUZA and  
JOHN F. SULLIVAN,

By JAMES L. DeSOUZA,  
Attorneys for Plaintiff.

State of Arizona,  
County of Maricopa—ss.

Frank M. Siegmund, being first duly sworn upon oath, deposes and says:

That he is Plaintiff named in the above and foregoing Complaint; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief and as to those matters he believes it to be true.

FRANK M. SIEGMUND.

Subscribed and sworn to before me this 17th day of February, 1948.

JAMES L. DeSOUZA,  
Notary Public.

My Commission expires May 11, 1949.

[Endorsed]: Filed Feb. 17, 1948.

[14]

District Court of the United States for the District  
of Arizona, Phoenix Division

Civil Action File No. 1142-Phx.

[Title of Cause.]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon James L. DeSouza and John F. Sullivan, plaintiff's attorneys, whose address is 508 Luhrs Tower, Phoenix, Arizona, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

(Seal) WM. H. LOVELESS,  
Clerk of Court.

By GERTRUDE I. BITTING,  
Deputy Clerk.

Date Feb. 17, 1948. [15]

(Returns of Service of Writ attached.) [16]

[Endorsed]: Filed Mar. 1, 1948.

## RETURN OF SERVICE OF WRIT

I hereby certify and return, that on the 17th day of February 1948, I received the within summons and on the 17th day of February 1948 I served same on the therein named Thelma M. Akana both as an individual and as Secretary of the General Commodities Corporation at the Phoenix, City Airport, Phoenix, Arizona at 6:45 p.m. Wm. H. Heen at room 704 Westward Ho Hotel, Phoenix, Arizona at 7:15 p.m. W. T. Davis both as an individual and as Vice President of the General Commodities Corporation, at 726 Encanto Drive SE, Phoenix, Arizona at 8:00 p.m.

All services made by showing each of them the original and by handing to and leaving with each of them a copy thereof together with a copy of complaint attached.

Marshal's Fees: Travel, \$.98; Service, \$12.00.  
Total \$12.98.

B. J. McKINNEY,  
U. S. Marshal.

By TED O. MULLEN,  
Deputy U. S. Marshal.

## RETURN ON SERVICE OF WRIT

Civil No. 1142 Phoenix

United States of America,  
District of Arizona—ss.

I hereby certify and return that I served the annexed Summons on the therein-named Ernest K.

Kai by handing to and leaving a true and correct copy thereof to which was attached copy of complaint, with Ernest K. Kai in front of No. 726 Encanto Drive, S.E., at the same time showing him the original summons at 5:45 p.m. personally at Phoenix in said District on the 18th day of February, 1948.

B. J. McKINNEY,  
U. S. Marshal.

By FRANKLIN S. WILLETS,  
Deputy.

## RETURN ON SERVICE OF WRIT

Civil No. 1142 Phoenix

United States of America,  
District of Arizona—ss.

I hereby certify and return that I served the annexed Summons on the therein-named Wm. H. Heen by showing him the original and at the same time by handing to and leaving a true and correct copy thereof with copy of complaint attached with him in Atty. Rawlins' office, Security Building, at 5:25 p.m. personally at Phoenix in said District on the 20th day of February, 1948.

Service, \$2.00; Travel, \$.06.

B. J. McKINNEY,  
U. S. Marshal.

By M. CASSIE BAKER,  
Deputy.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO  
QUASH RETURN OF SERVICE AND TO  
DISMISS ACTION

State of Arizona,  
County of Maricopa—ss.

W. T. Davis, being first duly sworn on oath, deposes and says:

That he is one of the defendants in the above entitled action and is also an officer of General Commodities Corporation, Limited, defendant therein, and makes this affidavit for and on behalf of all of the defendants served in said action; that the defendant, General Commodities Corporation, Limited, is a corporation organized under the laws of the Territory of Hawaii; that said corporation has not qualified to do business in the State of Arizona, and has not appointed or authorized any officer or agent to accept service on its behalf of any process whatsoever in the State of Arizona; said corporation has not at any time carried on business in the State of Arizona, and said corporation is not now carrying on business in the State of Arizona; that said corporation has not at any time maintained a business office or business agency in the State of Arizona, and does not now maintain a business office or business agency in said state; that the contract sued on in plaintiff's complaint in the above entitled action was entered into outside of the State of Arizona; that this defendant,

W. T. Davis, and the [17] defendants, William H. Heen, Ernest K. Kai and Thelma M. Akana, are all non-residents of the State of Arizona; that the subject matter of said action, if any, arose outside of the State of Arizona;

The foregoing affidavit is made in support of the motions of said defendants to quash return of service of summons and dismiss said action.

W. T. DAVIS.

Subscribed and sworn to before me this 6th day of March, 1948.

(Seal)

ARTHUR M. DAVIS,  
Notary Public.

My Commission expires 2/26/51.

#### EXHIBIT A

[Endorsed]: Motion of W. T. Davis, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, to quash return of service of summons and dismiss action, memorandum in support of motion, affidavit in support of motion to quash return of service and to dismiss action, and notice of hearing motion filed, March 8, 1948. [18]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MEMORAN-  
DUM IN OPPOSITION OF DEFENDANTS'  
MOTION TO DISMISS AND QUASH  
SERVICE

State of Arizona,  
County of Maricopa—ss.

Frank M. Siegmund, being first duly sworn, upon oath deposes and says:

That he is the Plaintiff in the above entitled Action; that since the execution of the contract referred to in the Complaint in this Action, he has been the exclusive sales representative in the United States of America of the Defendant General Commodities Corporation, Limited, and has negotiated numerous sales transactions and solicited numerous customers for the merchandise of said corporation and has at all times maintained the national sales headquarters of said corporation at Phoenix, Arizona, and carried on said negotiations and solicitations for the most part at Phoenix, Arizona; that the major business of said corporation as to sales has been carried on in the United States of America and through affiant's sales headquarters at Phoenix, Arizona; that numerous transactions for the sale of said corporation's merchandise, all in very large quantities and at very large total prices and comprising a substantial portion and, affiant is credibly informed and believes, the major portion of the sales of said Corporation have been [19] negotiated at Phoenix, Arizona, by affiant



and by Defendant W. T. Davis as an officer of said corporation, and that numerous large customers and purchasers of said corporation's merchandise have been requested to come and did come to Phoenix, Arizona, for the negotiation of said transactions, including among others Bert Kaplan, Jack Purdy, Admiralty Trading Company, and affiant is credibly informed and believes also including the purchasing representatives of the Indonesian Government, and negotiators for the purchase of goods by the Bethlehem Steel Corporation, which said transaction affiant truly believes represents a sales price of Thirty-seven Million Dollars and that said transactions were negotiated at Phoenix, Arizona; that Defendant W. T. Davis at all times since the formation of said corporation was its Vice President and executive director and held the Power of Attorney of said corporation which affiant believes to be a General Power of Attorney, with the exception of a period of from five days to one week, and that said W. T. Davis is the person principally interested in said corporation, and who had authority to negotiate transactions on behalf of said corporation and that said W. T. Davis made his headquarters within the United States of America at Phoenix, Arizona, and performed a substantial portion of the negotiations on behalf of said corporation at Phoenix, Arizona; that several letters of credit in payment of very large sales prices by customers of said corporation were placed with the Valley National Bank at Phoenix, Arizona, and that affiant is credibly informed and believes that Phoenix, Arizona, is and

has been for some time, the principal place of payment to said corporation by its customers; that a substantial portion of the financing required by said corporation in the consummation of its transactions was made at Phoenix, Arizona, by and through the Valley National Bank, and that negotiations for such financing were carried on at Phoenix, Arizona; that Plaintiff is credibly informed and [20] believes that, as shown by the Deposition of Wm. H. Heen filed herein, the Honolulu headquarters of said corporation consists of only one room in an office building across the hall from the offices of Heen and Kai, Attorneys for said corporation, and affiant is credibly informed and believes that none of the sales of said corporation nor any substantial portion of its business were transacted at Honolulu, Hawaii.

FRANK M. SIEGMUND.

Subscribed and sworn to before me this 13th day of March, 1948.

JAMES L. DeSOUZA,  
Notary Public.

My Commission expires May 11, 1949.

Received copy hereof this 15th day of March, 1948.

RAWLINS, DAVIS,  
CHRISTY & KLEINMAN,  
By GEO. H. RAWLINS/VH,  
Attorneys for Defendants, General Commodities  
Corporation, Limited, W. T. Davis, Wm. H.  
Heen, Ernest K. Kai, and Thelma M. Akana.

[Endorsed]: Filed Mar. 15, 1948.

[21]

In the United States District Court for the  
District of Arizona

Minute Entry of Monday, March 22, 1948

(Phoenix Division)

October 1947 Term at Phoenix.

Honorable Dave W. Ling, United States District  
Judge, presiding.

[Title of Cause.]

Motion of defendants W. T. Davis, William H. Heen, Ernest K. Kai, and Thelma M. Akana to Quash Return of Service of Summons and Dismiss Action and Motion of defendant General Commodities Corporation, Ltd., to Quash Return of Service of Summons and Dismiss Action come on regularly for hearing this day. James L. DeSouza, Esquire, and John F. Sullivan, Esquire, appear for the plaintiffs. George H. Rawlins, Esquire and William G. Christy, Esquire, appear for the defendants.

On the motion of John F. Sullivan, Esquire, It Is Ordered that the plaintiff be allowed to amend the complaint by interlineation by adding the words "that said corporation has been continuously and now is doing a substantial portion of its business in the State of Arizona", at the end of line 23 of page one.

George H. Rawlins, Esquire objects to said amendment on the ground that proof of allegation should be made.

Hearing on said Motions to Quash Return of Service of Summons and Dismiss Action is now had.

Frank M. Siegmund is now sworn and cross-examined by counsel for the defendants as an adverse party and is examined in his own behalf.

David H. Caswell is now sworn and examined on behalf of the plaintiff.

Counsel for the plaintiff now files Deposition of William H. Heen and copy of deposition of Glenn C. Taylor, each unsigned, in opposition to motions herein and counsel for the defendants stipulate that said depositions, as filed, are correct.

It Is Ordered that counsel for the plaintiff be allowed to withdraw copy of deposition of Glenn C. Taylor and substitute the original therefor at a later date. [22]

It Is Ordered that the said Motions to Quash Return of Service of Summons and to Dismiss Action be submitted and taken under advisement.

[Title of District Court and Cause.]

The following are the portions of the deposition of William H. Heen referred to in Plaintiff's Designation of Record on Appeal and in Defendant's Designation of Additional Portions of Record on Appeal:

(Page 1)

DEPOSITION OF WILLIAM H. HEEN

(Page 2)

Mr. DeSouza:

Q. Will you state your name please?

A. William H. Heen.

Q. Where do you reside?

A. Honolulu, Hawaii.

Q. You are a citizen of the Territory of Hawaii?

A. That is correct.

(Page 3)

Q. What position, if any, do you hold with the General Commodities Corporation, Limited.

A. I am the president.

Q. How long have you been the president of that corporation?

A. Since the corporation was organized.

Q. When was the corporation organized?

A. My best recollection is it was organized in May, 1947.

Q. Was it organized under and by virtue of the laws of the Territory of Hawaii?

A. That is correct.

(Deposition of William H. Heen.)

Q. The corporation itself is then a resident and citizen of the Territory of Hawaii?

A. I guess that is correct as a matter of law.

(Page 9)

A. Those who formed the corporation were to my best recollection W. T. Davis, also known as W. Thomas Davis; Thelma M. Akana; Ernest K. Kai and myself.

Q. Have any subsidiary corporations or substitute corporations been organized to handle any of the transactions which it was originally [24] contemplated would be handled by General Commodities Corporation, Limited? A. No.

(Page 10)

Mr. DeSouza: Q. How much stock do you own in General Commodities Corporation, Limited?

A. To the best of my recollection 250 shares of common stock of the par value of ten dollars per share, fully paid up.

Q. What is the present book value of your shares? A. I don't know.

(Page 13)

Mr. DeSouza: Q. Where is the office of the General Commodities Corporation located?

The Witness: That is all right with you, counsel?

Mr. Rawlins: Yes, tell him where it is.

The Witness: Honolulu.

Mr. DeSouza: Q. What is the address of the office in Honolulu?

(Deposition of William H. Heen.)

A. 217 Hawaiian Trust Building, Honolulu, Hawaii.

Q. What is the nature and amount—by which I mean the size of the space used by the corporation as its office?

Mr. Rawlins: I instruct you to answer that because that would be germane to the jurisdiction of the court; if he wants to know whether you have an office ten by twelve or 40 by 50 you may tell him.

(Page 14)

A. The office is one single room, I would say about 12 by 18 feet.

Mr. DeSouza: Q. How many employees are in that office?

Mr. Rawlins: May I say working in and out of the office or who have a desk?

Mr. DeSouza: Q. First who have a desk in the office. A. Three.

Q. Is that office in connection with your own office or is it a separate office? A. Separate.

(Page 22)

Q. Is it contemplated that the corporation will pay your travelling expenses?

A. Oh, yes, but I have had to advance some of the travelling expenses.

Q. Is it contemplated that the General Commodities Corporation will pay for your present trip on which you are now in Phoenix?

A. So far as legal fees are concerned, yes.

(Deposition of William H. Heen.)

Q. What about expenses?

A. Oh, yes, expenses too.

Q. You are here in behalf of the corporation?

A. That is right.

Q. And transacting business here on behalf of the corporation?

A. No, we are not conducting any business in Phoenix at all.

(Page 23)

Q. I am merely referring to the fact that you are here for the purpose of engaging in conferences and negotiations on behalf of the corporation.

A. That is right.

(Page 27)

Mr. DeSouza: Q. Have you personally received payment of any money apart from payment to the General Commodities Corporation, Limited, from any sellers or purchasers of commodities purchased or (Page 28) sold by General Commodities Corporation, Limited?

A. I would like to answer that question but I don't want it to appear that we are waiving any rights in this question. I have not.

Mr. Rawlins: Personally he hasn't received anything.

Mr. DeSouza: Q. Has any such payment of money been promised to you or agreed to be paid to you? A. No, not one cent; none at all.

Mr. DeSouza: Q. Where does the General Commodities Corporation bank?



(Deposition of William H. Heen.)

Mr. Rawlins: I advise you to answer for the reason it may be germane on the question of jurisdiction.

A. I will answer that question without waiving any rights. This corporation banks with [26] (Page 29) the Bishop National Bank, Hawaii.

Mr. DeSouza: Q. Does it bank in any other place? A. Yes, the Bank of Guam.

(Page 31)

Mr. DeSouza: Q. Have you ever received any gifts from the General Commodities Corporation, Limited? A. No, no gifts.

Q. Have you ever received any gifts from Mr. W. T. Davis? A. No.

[Endorsed]: Filed Mar. 22, 1948. [27]

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[Title of District Court and Cause.]

The following are the portions of the deposition of Glenn C. Taylor referred to in Plaintiff's Designation of Record on Appeal and in Defendant's Designation of Additional Portions of Record on Appeal:

(Page 1)

DEPOSITION OF GLENN C. TAYLOR

(Page 2)

Mr. DeSouza: It is our intention to take the deposition of Mr. Glenn C. Taylor as an adverse witness.

Mr. Rawlins: Objection is interposed to that

(Deposition of Glenn C. Taylor.)

for the reason there is no foundation either in fact, in pleading or in law. That is a matter to be determined by the District Court. I further object to the taking of Mr. Taylor's deposition because he is a resident of this county and there is no allegation that he is about to disappear or that it is taken for the purpose of preserving his testimony in the event of death.

(Page 6)

Q. Have you ever acted or are you now acting as a trustee for the General Commodities Corporation, Limited?

A. No, I have not and am not now acting in any capacity for General Commodities Corporation, Limited.

Q. Is the Valley National Bank now acting or has it ever acted as a trustee for the General Commodities Corporation, Limited?

A. It has not.

Q. Have you at any time received any moneys, securities, letters of credit or other instruments on behalf of the General Commodities Corporation, Limited?

Mr. Rawlins: Just a minute, object to that for the reason that the issue is whether or not Mr. Siegmund has a contract with General Commodities Corporation, Limited; second, whether or not he can recover, the matter of an accounting and the internal affairs of the corporation are matters to be gone into after the liability of the corporation

(Deposition of Glenn C. Taylor.)

is established. This matter is incompetent, irrelevant and immaterial and further the General Commodities [28] Corporation at this time as well as when counsel first appear, object to this procedure (Page 7) for the reason that the District Court has no jurisdiction over said corporation; for the further reason that the question is for the purpose of annoying, embarrassing or oppressing Mr. Taylor who has heretofore been declared to be an adverse witness and refuse to answer, except the refusal is modified except as to a Yes or No answer. I instruct you as your attorney to answer Yes or No. Will you read the question?

(Pending question read by the Reporter.)

A. Yes.

Mr. DeSouza: Q. Do you now have in your possession any moneys, instruments, letters of credit, securities or other documents of any kind on behalf of the General Commodities Corporation, Limited?

Mr. Rawlins: I make the same objection and instruct Mr. Taylor to answer that question Yes or No.

(Discussion off the record.)

A. I think they have all expired but I am not certain as to that. I will give you that information.

Mr. DeSouza: I will appreciate it very much if you will.

Q. Mr. Taylor, with reference to the (Page 8) conversation which has just taken place I will ask you whether or not you have such instruments which may or may not have expired?

(Deposition of Glenn C. Taylor.)

A. I do, yes.

Q. What is the nature of those instruments?

Mr. Rawlins: Object to that for the reasons heretofore stated, without repeating them.

Mr. DeSouza: Q. I will ask you whether any of those instruments are in the form of letters of credit?

A. Yes—I would say “were” letters of credit perhaps as I am not definitely sure whether they have not expired as to time.

Q. Are those instruments in your possession individually or as an officer of the Valley National Bank? [29]

A. In the possession of myself as vice president of the Valley National Bank.

Q. Do you have any moneys in your hands belonging to the General Commodities Corporation, Limited? A. I have not.

(Page 9)

Q. Does the Valley National Bank have any moneys in its hands belonging to the defendant General Commodities Corporation, Limited?

A. It has not.

Q. Have either you or the Valley National Bank had such moneys in your hands within the last five days? A. We have not.

Q. With reference to the letters of credit which you have just mentioned, by the term “expiration” are you referring to a term included in such letters of credit or are you referring to their expiration by reason of payment?

(Deposition of Glenn C. Taylor.)

(Page 10)

Q. Mr. Taylor, have you or the Valley National Bank paid out any moneys upon such letters of credit to the General Commodities Corporation, Limited? A. I have not.

Q. Have you paid out any moneys or has the Valley National Bank paid out any moneys to Mr. W. T. Davis also known as W. Thomas Davis, Mr. William H. Heen, Mr. Ernest K. Kai or Mrs. Thelma M. Akana?

Mr. Rawlins: Object to the form of that question until counsel clarifies it. If the question means has he paid out any money to these individuals upon letters of credit that run to the General Commodities Corporation, meaning in plain words has he paid out money that belongs to this (Page 11) corporation to any of these individuals upon letters of credit personally so they might be charged with sequestering it.

Mr. DeSouza: I will accept that amendment to the question. [30]

A. I have not.

(Discussion off the record.)

Mr. DeSouza: Q. Have you paid any such moneys to any assignees of such individuals on such letters of credit? A. I have not.

Q. Have you paid any such moneys to any assignee or assignees of General Commodities Corporation, Limited, upon such letters of credit?

A. We have not.

(Deposition of Glenn C. Taylor.)

Q. I take it your answers go both individually and as to the Valley National Bank?

A. That is correct.

(Page 12)

Q. Approximately how many of such letters of credit are there? A. I think one.

Q. One letter of credit?

A. I think that is all we have or have ever had.

(Page 17)

Q. Do you know whether any transaction has been consummated between General Commodities Corporation, Limited, and the Admiralty Trading Company?

(Page 18)

A. Yes.

Q. Has such a transaction been consummated?

A. I will have to refer to that letter of credit. I don't know whether it was ever used or not, I would prefer to look at the document.

Q. Do you know of any transactions between the General Commodities Corporation and anyone, meaning individual, group, corporation or otherwise, regarding tractors and heavy equipment?

Mr. Rawlins: Answer Yes or No.

A. Yes. [31]

(Page 19)

A. Yes.

Mr. DeSouza: Q. With whom is that transaction entered into or has it been entered into?

(Deposition of Glenn C. Taylor.)

A. I don't think I can answer that. We have handled no direct transactions in our bank it would only be a matter of hearsay, I can't answer it definitely.

Q. You don't know with whom?

A. I do not.

(Page 20)

Q. You have referred to a letter of credit expired or unexpired which is now in your hands, and subject to your checking your files you believe you have only one such letter of credit (Page 21) in connection with the General Commodities Corporation. Have you or the Valley National Bank at any time had any other letters of credit in your possession in connection with transactions with the General Commodities Corporation?

A. Yes.

Q. Have payments been made upon such letters of credit or any of them?

A. I can't answer that without reference to the documents.

(Page 22)

Mr. DeSouza: Q. Do either General Commodities Corporation, Limited, or W. T. Davis also known (Page 23) as W. Thomas Davis have any account in the Valley National Bank?

A. They do not.

Q. Have either of them had an account in the Valley National Bank since August 28, 1947?

A. They have not.

[Title of District Court and Cause.]

(Page 1)

DEPOSITION OF  
WILLIAM THOMAS DAVIS

William Thomas Davis, being first duly sworn to testify to the truth, the whole truth and nothing but the truth, was cross examined on behalf of the plaintiff and testified as follows:

Cross Examination

By Mr. DeSouza:

Q. Will you state your name?

A. William Thomas Davis.

Q. Are you also known as W. T. Davis and W. Thomas Davis?

A. I am known as W. T. Davis. I don't know about the W. Thomas.

Q. You are the defendant in this action?

A. That is right.

Q. Mr. Davis, are you acquainted with a [33] corporation known as General Commodities Corporation, Ltd.?

A. Yes.

Q. And when was that corporation organized?

A. I don't remember.

Q. Approximately a year ago, or somewhere thereabouts?

A. I presume it has been in existence some time like that.

Q. Who were the persons who actively participated in the organization of that corporation?



(Deposition of William Thomas Davis.)

A. You mean the people who held the first (Page 2) meeting?

Q. I mean the people who were really materially interested in the corporation.

A. William H. Heen, Ernest K. Kai, Thelma Akana and myself.

Q. Do you hold any office with that corporation?

A. Yes, sir, I am vice-president of it.

Q. You also bear the title of executive director?

A. Not to my knowledge. I am executive vice-president.

Q. Have you held that position since the corporation was organized? A. Yes.

Q. In addition to holding office in the corporation do you also hold a power of attorney from the corporation? A. Yes.

Q. And how long have you held that power of attorney? A. About thirty days. [34]

Q. Have you ever held a power of attorney from the corporation prior to thirty days ago?

A. Yes.

Q. When did you first receive a power of attorney from the corporation?

(Page 3)

A. I don't remember.

Q. Could you say approximately. Was it a month ago or a year ago, as near as you can?

A. I couldn't say approximately. I don't have any idea when I got it.

Q. Have you held power of attorney continu-

(Deposition of William Thomas Davis.)

ously or has there been more than one power of attorney?

A. There has been more than one power of attorney.

Q. How much time elapsed between one power of attorney and the other?      A. I don't know.

Q. Were those general powers of attorney or special?

A. I don't recall that, whether they were general or special.

(Page 6)

Q. What is the nature of the assets now held by General Commodities Corporation, Ltd.?

A. I don't know of any assets they have in Arizona.

(Page 12)

Q. Now, as to the deals which have been completed did title to that goods pass to General Commodities Corporation, Ltd.?

A. I don't know.

Q. Well, I will ask you whether the title [35] passed from the appropriative agencies of the Chinese Government to anyone?

A. Upon payment, yes.

Q. To whom did the title pass on those deals?

A. To the buyer, the ultimate buyer.

(Page 13)

Q. And you mean by that, the organizations which purchased the goods from General Commodities?      A. That is right.

(Deposition of William Thomas Davis.)

Q. And by your statement, "I don't know" a moment ago, as to whether or not title to passed to General Commodities, do you mean that you don't know whether the title went into General Commodities and then out again or whether the title went directly from the Chinese agencies to the ultimate purchasers? A. That is right.

(Page 20)

Q. Did you discuss that with Judge Heen while he was out here?

A. I don't believe so. I was sick when Judge Heen was here.

Q. You did talk with him, though?

A. On various occasions.

Q. Did you discuss it with either Mr. Kai or Mrs. Akana while they were out here?

A. You mean payment?

Q. Yes, sir.

A. No, I don't believe so. I believe that I did discuss it with Mr. Porter Dunlap of the Bank of America when he was here.

Q. What did Mr. Porter Dunlap of the Bank of America say to you with regard to payment and whether it had been made?

A. Do you mean to the Chinese Government or from the— [36]

Q. To General Commodities from its purchasers.

A. We didn't discuss that phase of it. We were discussing payment to China and how it was to be (Page 21) handled.

(Deposition of William Thomas Davis.)

Q. Who negotiated the transactions we have just been referring to as to price on behalf of General Commodities?

A. What transactions?

Q. The Ken Royce Company, for one.

A. Dave Evans, Bill Day, myself negotiated the Ken Royce transactions.

Q. Who negotiated the Hyman Michaels transaction on behalf of General Commodities?

A. Myself, in San Francisco.

Q. Who negotiated the Bethlehem Steel deal on behalf of General Commodities?

A. I did in Chicago.

Q. And who negotiated the Admiralty Trading Company deal on behalf of General Commodities?

A. George Rawlins in Chicago.

Q. Then on the Ken Royce Company deal, the Hyman Michaels Company deal and the Bethlehem deal you personally participated in negotiations of those deals on behalf of General Commodities?

A. Yes, one of them from Okinawa, one of them from Shanghai and one in San Francisco. Yes, I did that.

(Page 22)

Q. As a matter of fact, Mr. Davis, you personally went on to most of the islands in the South Pacific on which these goods were located and supervised the inventory yourself, did you not?

A. No, sir. I have been on most of the South [37] Pacific Islands but just as an observer. I had nothing to do with inventory.

(Deposition of William Thomas Davis.)

Q. It is true, is it not, that you upon inspection of this equipment fixed the prices for it?

A. No, sir, that was done by Mr. Dave Evans in most cases.

Q. Were you there in company with Mr. Dave Evans?

A. That is right. It was done in Okinawa as I recall.

Q. Did you discuss with him the prices to be fixed upon this merchandise?

(Page 23)

A. On various pieces of it, yes.

(Page 24)

Q. Then, as of this date to the best of your knowledge General Commodities has received payment for nothing in full?      A. That is right.

(Page 25)

Q. Has the Chinese Government been paid off in full on any of that merchandise?

A. Yes, sir.

Q. And who made that payment?

A. Most of the payments were made by the Bank of America of San Francisco.

Q. What was the source of funds from which they made the payments?

A. Letters of credit.

Q. And those were for the account of General Commodities Corporation, Ltd.?

A. Yes, sir.

(Deposition of William Thomas Davis.)

(Page 26)

Q. It is fact, is it not, Mr. Davis, that you are the guiding light of this corporation. You are [38] the person who procured its organization and who has conducted the greater part of its business and formulated its policies?

A. That information is available in Honolulu. I have not formulated its policies. I have been very definitely against some of its policies.

Q. Who, in your opinion, formulates the policies of the corporation? A. The directors.

Q. Are you one of the directors?

A. Yes, sir.

Q. The other directors are Judge Heen, Mr. Kai and Mrs. Akana? A. That is right.

Q. And they have on occasions overridden your recommendations?

A. Very often. I am only a small cog in a wheel out there. I don't have control, if you want to know that. Control is vested in the other (Page 27) three directors.

Q. Have you ever at any time had control of the corporation? A. No, sir.

Q. Have you ever at any time had any greater degree of control than you state that you have at the present time?

A. No, but I have certainly had a lesser degree.

(Page 28)

Q. That is correct. To clarify that, no payment has been made to you as an individual on any of these deals? A. No, sir.

(Deposition of William Thomas Davis.)

Q. Have you ever received any commissions on any of these deals? [39]

A. From General Commodities?

Q. From anyone?

A. Never any commissions, no.

(Page 30)

Q. Getting back to these letters of credit, Mr. Davis, have any of those been posted with the Valley National Bank in Phoenix? A. No, sir.

Q. The Valley National Bank in Phoenix has not to your knowledge ever had in its possession a letter of credit for the benefit of General Commodities Corporation?

A. No, sir. It might have file copies of letters of credit. It has never had an original copy of a letter of credit to my knowledge. What these other directors did when they were up here and I was ill I don't know.

Q. Well, referring particularly to letter of credit from the Admiralty Trading Company, has the Valley National Bank ever had that in its possession?

A. Yes, sir. It has a letter of credit in its possession now.

Q. And that is the original? A. Sir?

Q. That is the original letter of credit?

A. Yes, sir.

Q. And that is payable to General Commodities Corporation?

A. No, sir. It is not payable to the General  
(Page 31) Commodities Corporation.

(Deposition of William Thomas Davis.)

Q. Payable to who?

A. It is payable to W. T. Davis.

Q. What are the circumstances giving rise to the fact that letter of credit is payable to W. T. Davis? [40]

A. That is corporate business and will have to be received from the corporation in Honolulu. I don't have the right to divulge that information.

Q. That is in the nature of a personal payment to you, however? A. No, sir.

Q. Although it is payable to W. T. Davis is it for the actual benefit of General Commodities Corporation? A. It is.

Q. And the proceeds when received by you will be paid to the General Commodities Corporation?

A. The proceeds have already been paid to General Commodities.

(Page 32)

Q. Has the Valley National Bank ever arranged for credit for any customers on any of these deals?

A. No, sir. As a favor to me they lent some of these buyers some money.

Q. What buyers do you refer to?

A. Ken Royce.

Q. And did Ken Royce use that money in making payment to General Commodities?

A. I presume he did.

Q. Was that the understanding as to the purpose of that loan?

(Page 33)

A. It was set up in the form of a credit, yes.



(Deposition of William Thomas Davis.)

Set up in the Crocker First National Bank in San Francisco.

Q. Has any distribution of profits been made to you by General Commodities Corporation?

A. No, sir. [41]

(Page 34)

Q. Have you received any other payment from General Commodities Corporation other than expenses?

A. No. I borrowed some money from General Commodities Corporation.

Q. It is the understanding that is to be repaid to the corporation.

A. That is that letter of credit over in the Valley Bank.

Q. What is the amount of the letter of credit?

A. \$105,000 as I recall. I don't know exactly what it is.

Q. To the best of your knowledge that is the approximate amount?

A. Yes, that is the approximate amount.

(Page 35)

Q. You are in regular telephone communication with the directors in Honolulu, are you not?

A. No, sir. I have talked to Honolulu once in the last six weeks. And then to Jim Burke; I talked to him this morning.

(Page 36)

Q. Do you correspond with the directors of the company?

A. No, sir.

(Deposition of William Thomas Davis.)

(Page 37)

Q. Are you at present exerting your exclusive services toward the dealings of General Commodities Corporation, Ltd.?      A. No, sir.

(Page 38)

Q. Where was the last income tax return filed for which you have any knoweldge as to the place of filing?      A. Honolulu. [42]

Q. Who files the corporate tax returns of General Commodities Corporation?

A. I presume it will be filed by Mr. Gillett.

Q. And do you know where it will be filed?

A. I have no knowledge of anything connected with General Commodities. Being a Hawaiian corporation I imagine it will be filed in Honolulu.

(Page 39)

Q. To your knowledge has General Commodities Corporation ever made any gifts to anyone?

A. Yes, sir.

Q. To whom were those gifts made?

A. To me.

Q. What is the nature of those gifts?

A. One new Chrysler automobile.

Q. Have any subsidiary corporation been formed by General Commodities Corporation?

A. No, sir.

(Page 45)

Q. Do you recall accompanying Frank Siegmund to San Francisco at which time there was negotiation on the Hyman Michaels deal and the Purdy deal and some nail deals?

(Deposition of William Thomas Davis.)

A. I recall very vividly that we were supposed to sell some nails to one of Mr. Siegmund's customers that didn't materialize. And I recall discussing the Hyman Michaels deal which was brought to me by Mr. Ken Royce who needed some help in his joint venture and brought Hyman Michaels into the deal. The Purdy Company deal I recall discussing with Mr. Ferris who brought it to us and who incidentally claims a five percent commission on it, when it is made, in San Francisco while Frank Siegmund was there. [43]

Q. Now, do you recall negotiating a contract with Frank regarding sales of any deals on behalf of General Commodities? A. Yes, sir.

(Page 46)

Q. And pursuant to those negotiations such a contract was entered into?

A. Yes, sir. And under the terms of that contract the first deal that I got was for bacon and I want somebody to pay me for my bacon. That is all I want.

Q. Has Frank Siegmund performed any of his obligations under that contract?

A. Not to my knowledge.

Q. Is it your understanding then General Commodities does not intend to pay Frank anything.

A. That could be determined in Honolulu and only in Honolulu. The directors meet out there (Page 47) and any claim that he has would have to be filed with them and approved by them.

Q. You don't know of your own knowledge that

(Deposition of William Thomas Davis.)

they owe him anything?      A. No, sir.

Q. You signed this contract in San Francisco with Frank, however?      A. That is right.

Q. Now, on final negotiations of these deals did you permit anyone other than yourself to make (Page 48) those final negotiations and close the deals?

A. I only know that I was called by Dorothy Westrope, Frank Siegmund's secretary, who informed me that Frank Siegmund had a \$30,000,000 letter of [44] credit in the First National Bank in Chicago, and that the purchasing agent for the Japanese Government was there, and insisted that I go immediately to Chicago, which I refused to do repeatedly, having three or four boatloads of materials and equipment coming into the West Coast. But finally after much persuasion I went to Chicago. I was greeted by two Jew brokers who took me to some hotel in Chicago and informed me that their purchaser with this \$30,000,000 letter of credit would see me at two o'clock in the afternoon, and that he was the top man with Mitsubi. They had the money; they had given this \$30,000,000 to buy from us all the equipment on the island of Manus. I met this so-called purchasing agent the next morning at ten o'clock, having a desire to see the horses run that afternoon, I went to the horses that afternoon. When I met this so-called purchasing agent for the Japanese Government it turned out that he was a little guy that I had known on the West Coast for many years, a hust-

(Deposition of William Thomas Davis.)

ler, who had never had \$2,000 at any one time in his (Page 49) life, in my belief. And that all he wanted was front money; that I ended up giving him \$700 front money personally. Now, if that constitutes any basis for all this action then you have a basis for action.

Q. Did you contact the Continental Illinois Bank in Chicago to confirm that deal?

A. I did.

Q. What was their answer?

A. They told me that Mr. William O'Neil was a man who probably could raise \$50,000, that he was company trustee under his father's will; that his [45] father had been a very successful man and that they probably would lend him, if conditions were exactly right, not to exceed \$50,000. The record of that conversation and their reply is available for this statement in Honolulu. It is in our file out there. In other words, they were trying to buy \$30,000,000 worth of equipment with a broken down Jap front money artist, and a man who could raise \$50,000 if he was hard pressed, but who had no inclination to raise it in the first place.

Q. Who was the Japanese in question?

A. Charley Onishi.

Q. Did you advise the Continental Illinois Bank in Chicago that Frank Siegmund was your sole (Page 50) representative in the United States?

A. No, sir, to my remembrance. I might have said he represented us.

Q. Have you had any further negotiations with Mr. Onishi since that time?

(Deposition of William Thomas Davis.)

A. Yes, we hired him to do a job for us. He is a pretty fair artist when it comes to getting money, I will tell you that.

Q. And what was the nature of the job for which he was hired?

A. For your information we contemplate doing some business in Indonesia and he at my request went to New York to conclude some business with the Indonesian representative Doctor Sometro Djojo Cosimio.

Q. Was that Indonesian transaction also discussed or brought up on the occasion in Chicago when you went back there? [46]

A. I told Charley Onishi that the Indonesians were ready to do some business.

Q. Have you or has the corporation concluded any deal with the Indonesians? A. No, sir.

Q. Has such a deal been in process of negotiation? A. It has.

Q. It is a fact, is it not, that certain of (Page 51) these Indonesian representatives came to Phoenix a month or so ago for the purpose of negotiating that transaction?

A. No, sir, they came as my guests to visit me while I was ill, which is a common custom in the Orient. I have a guest at my house now from Shanghai.

Q. On the occasion we have referred to in Chicago did you also meet Mr. Kaplan?

A. No, sir, I didn't meet Mr. Kaplan in Chicago.

(Deposition of William Thomas Davis.)

Q. Was any discussion had at that time regarding Mr. Kaplan?

A. I think Mr. Kaplan called me or talked to me over the phone and asked to meet me. I didn't have time to stay and meet him.

Q. Did you discuss any deal with him over the phone? A. I don't recall.

Q. At the time when these Indonesians were here, as you say, as your guests, or whatever capacity they were here, were Mr. Heen, Mr. Kai and Mrs. Akana also here? A. Yes.

Q. Was there any negotiation between those parties to your knowledge? [47]

(Page 52)

A. No, sir, no negotiations.

Q. No discussions?

A. No discussions; purely a social visit to acquaint them with our country.

Q. Now, getting back to Chicago and this occasion for a moment, do you recall having an afternoon meeting at the Blackstone Hotel with Kaplan and Purdy?

A. Yes, I recall a meeting. I don't think Bert Kaplan was there, he might have been. Jack Purdy, Sparrow Purdy and Jack Duffy as I recall. I don't know. He wanted to see me.

Q. How long have you been in Phoenix?

A. I came here the 24th of December, 1947.

Q. Have you been here continuously since that time? A. Yes, sir.

Q. Did Mr. Kaplan and Mr. Purdy or either of them ever fly out here to Phoenix to meet you?

(Deposition of William Thomas Davis.)

A. Yes, they were here not long ago.

Q. And that was in connection with discussions of some of these deals?

A. Yes. Jack was out to the Biltmore. He came down to see me. And he had breakfast with me one morning, I believe. And Jack was out here last time when I was sick.

(Page 53)

Q. You were taken sick some time after you arrived in Phoenix, were you not?

A. That is right.

Q. While you were in Phoenix you kept in active touch with all of these deals, have you not?

A. Well, my part of them, yes, as far as loading equipment and supervising the field operations I have done that, yes. I hired a General Manager [48] from over in California and sent him out there to handle the operation for me and he has handled it and from time to time I have contacted him.

Q. Are you acquainted with a Mr. Tunneson?

A. Yes, sir, I met Mr. Tunneson.

Q. And was that in connection with any transactions of General Commodities?

(Page 54)

A. Well, Mr. Tunneson was another one of those individuals who could do a lot of talking but not much producing.

Q. Was he an independent hustler or did he represent some purchaser?

A. I don't know who he represented. I only know he went out to the Pacific at the request of



(Deposition of William Thomas Davis.)

Frank over in San Francisco. We cleared him clear to the Pacific Ocean. He went out and bought thirty-one pieces of equipment for himself.

(Page 55)

Q. Has Onishi been instrumental in promoting any deals which have been closed?

A. No, sir. I have got a substantial investment in Mr. Onishi which I will be glad to give you for your lawsuit.

Q. Has there been any conferences or discussions—

A. I want to be perfectly fair with you. You have asked me a lot of questions that you apparently are not sure of the answers. I am going to tell you: Mr. F. T. Lee came to see me as my friend. He is a very good friend of mine. He left for New York and in New York I understand he is doing some negotiations. They are not here; no part of them are here. He came to visit me and while he was visiting I told him of some difficulties we [49] were having in the contract and asked him when he (Page 56) was back there if he could straighten it out with them, we would appreciate it.

Mr. De Souza: That is all.

Examination by Mr. Rawlins:

Q. Mr. Davis, you came back from Shanghai on the 24th of December and took quarters in the Westward Ho Hotel, is that correct?

A. That is right.

Q. You stayed there about a week during which time you were ill and under a doctor's care and

(Deposition of William Thomas Davis.)

nurse's care, is that right? A. That is right.

Q. Then you went over to Los Angeles and to San Francisco on business trips?

A. That is right.

Q. Then you returned about the 10th of January, or somewhere along in there, to the Westward Ho Hotel in Phoenix here?

(Page 57)

A. I came back December 24th.

Q. I mean after you had been to Los Angeles around New Years. A. Yes.

Q. You came back here about the middle of January? A. That is right.

Q. You came back here and were under the care of Doctor Ehrlich? A. That is right.

Q. And then you were taken to the Good Samaritan Hospital? A. That is right. [50]

Q. When did you enter the Good Samaritan Hospital? A. I don't recall.

Q. How long were you there?

A. About two months.

Q. And then you rented this house temporarily and continued under the care of this doctor?

A. That is right.

Q. Does the General Commodities Corporation have an office here in Phoenix? A. No, sir.

Q. A telephone? A. No, sir.

(Page 58)

Q. Is there any contract in existence this day that had been entered into in Phoenix?

A. No, sir.

(Deposition of William Thomas Davis.)

Mr. De Souza: At this time we would like the record to show the deposition has been completed; that we consider the deposition to be completed. We have asked all of our questions and we are now leaving.

Q. There is no contract in existence signed in Phoenix, Arizona? A. No, sir.

Q. One was signed in Shanghai and one in Chicago?

A. No, no—yes, many contracts in Shanghai.

Q. There has been no business done by the corporation here? A. No.

[Endorsed]: Filed Apr. 5, 1948. [51]

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In the District Court of the United States  
for the District of Arizona

Minute Entry of Friday, April 30, 1948

(Phoenix Division)

April 1948 Term at Phoenix.

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Cause.]

It is ordered that defendants, General Commodities Corporation, W. T. Davis, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, be granted leave to file an Amended Motion to Quash Return of Service of Summons and to Dismiss Action herein. [52]

[Title of District Court and Cause.]

AMENDED MOTION OF W. T. DAVIS, WM.  
H. HEEN, ERNEST K. KAI AND THELMA  
M. AKANA TO QUASH RETURN OF  
SERVICE OF SUMMONS AND DISMISS  
ACTION.

Come now the defendants, W. T. Davis, William H. Heen, Ernest K. Kai and Thelma M. Akana, and move the Court as follows:

I.

To dismiss said action as to these defendants upon the grounds that the above-entitled Court is without jurisdiction of said action, in that the defendants, General Commodities Corporation, Limited, is a corporation organized and existing under the laws of the Territory of Hawaii, and the defendants, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, are all citizens and residents of said Territory of Hawaii, and that none of said named defendants are residents or citizens of any state, and said action is not a controversy between citizens of different states, all of which more clearly appears in the memorandum of points and authorities filed herewith.

II.

To dismiss the action upon the grounds that the above-entitled Court should refuse to accept jurisdiction of said action in that the primary defendant therein, General Commodities Corporation, Limited, is a foreign corporation not engaged in business in the State of Arizona, and that the sub-

ject matter of said action and the relief prayed for therein pertain entirely to the internal affairs of said defendant corporation; that none of the transactions referred [53] to in the complaint took place within the jurisdiction of the above-entitled Court; that all of the defendants are non-residents of the State of Arizona, all of which more clearly appears in the memorandum of points and authorities filed herewith.

**III.**

To dismiss the action because the complaint fails to state a claim against these defendants, or any of them, upon which relief can be granted, all of which more clearly appears in the memorandum of points and authorities filed herewith.

**RAWLINS, DAVIS,  
CHRISTY & KLEINMAN,**

**By WILLIAM G. CHRISTY,**  
Attorneys for the defendants, W. T. Davis, Wm.  
H. Heen, Ernest K. Kai and Thelma M. Akana.

Received copy this 30th day of April, 1948.

**JAMES L. DeSOUZA,**  
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 30, 1948. [54]

[Title of District Court and Cause.]

AMENDED MOTION OF GENERAL COMMODITIES CORPORATION, LTD., TO QUASH RETURN OF SERVICE OF SUMMONS AND DISMISS ACTION.

Comes now the General Commodities Corporation, Limited, an Hawaiian Corporation, and moves the Court as follows:

I.

To dismiss said action upon the grounds that the above-entitled Court is without jurisdiction of said action, in that this defendant is a corporation organized and existing under the laws of the Territory of Hawaii, and the defendants, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, are all citizens and residents of said Territory of Hawaii, and that none of said named defendants are residents or citizens of any state, and said action is not a controversy between citizens of different states, all of which more clearly appears in the memorandum of points and authorities filed herewith.

II.

To dismiss the action upon the grounds that the above-entitled Court should refuse to accept jurisdiction of said action in that the subject matter of said action and the relief prayed for therein pertain entirely to the internal affairs of this defendant, a foreign corporation, and that none of the transactions referred to therein took place within the jurisdiction of the above-entitled Court, all of

which more clearly appears in the memorandum of points and authorities filed therewith. [55]

III.

To quash the return of service of summons and the purported service of summons on this defendant, and to dismiss the action as against this defendant on the grounds that this defendant is a corporation organized under the laws of the Territory of Hawaii, and has not, and is not doing business in the State of Arizona, and was not and is not subject to service of process within the District of the State of Arizona, and that this defendant has not been properly served with process in this action, and that the Court is without jurisdiction over this defendant, all of which more clearly appears in the memorandum of points and authorities filed herewith.

RAWLINS, DAVIS,  
CHRISTY & KLEINMAN,

By WILLIAM G. CHRISTY,  
Attorneys for Defendant, General Commodities  
Corporation, Limited.

Received copy this 30th day of April, 1948.

JAMES L. DeSOUZA,  
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 30, 1948. [56]

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon,  
County of Mult.—ss.

Marvin Heaney, being first duly sworn on oath deposes and says:

That he is a resident of the City of Portland in the State of Oregon; that some time during the month of December, 1947, your affiant was advised by William O'Neil of the City of Chicago, that the General Commodities Corporation, Limited, through W. Tom Davis, Vice President and Executive Director of said corporation, was in a position to handle the sale and disposal of war surplus materials owned by the Republic of China. That your affiant thereupon made some contact with the Indonesian Government representatives in this country relative to the purchase of said war surplus materials. That your affiant called W. Tom Davis, Vice President and Executive Director of the General Commodities Corporation, Limited, via long distance telephone at the Westward Ho Hotel in Phoenix, Arizona and was advised by the said W. Tom Davis to come to Phoenix to negotiate and close any deal concerning the sale of war surplus materials through General Commodities Corporation, Limited.

Further your affiant sayeth not.

MARVIN HEANEY.

Subscribed and sworn to before me this 18th day of March, A. D. 1948.

(Seal)

HELEN HANNA,

Notary Public.

My commission expires Jan. 19, 1951. [57]



[Title of District Court and Cause.]

AFFIDAVIT

State of Illinois,  
County of Cook—ss.

Homer Stevenson, being first duly sworn on oath deposes and says:

That he is a resident of the Village of Oak Park, County of Cook and State of Illinois; that on or about the first day of September, 1947, through a mutual friend, namely one Dave Caswell, he was contacted as a partner of H. & H. Associates & Co. of River Forest, Illinois, relative to the disposal of certain war surplus materials owned by the Republic of China on the Islands of Manus and Guam in the Pacific Ocean; that at that time, Mr. Dave Caswell represented that one Frank Siegmund of Phoenix, Arizona, was the exclusive sale representative in the United States for the General Commodities Corporation, Limited, for the sale and disposal of said war surplus materials. That shortly thereafter, your affiant contacted, via long distance telephone, Frank Siegmund at Phoenix, Arizona and was advised that the General Commodities Corporation, Limited, whom he represented, was in a position to consummate contracts for the disposal of war surplus commodities owned by the Republic of China. That thereupon, your affiant asked for references and [58] was instructed to contact The Valley National Bank of Phoenix, Arizona; that subsequently thereto, your affiant contacted Mr. Glen C. Taylor of the Valley Na-

tional Bank at Phoenix, Arizona and was advised by Mr. Glen C. Taylor that he and the bank were thoroughly familiar with General Commodities Corporation, Limited, and that its vice president and executive director, W. T. Davis, was in Phoenix, and that his reputation for honesty and fair dealing was above reproach. That the General Commodities Corporation, Limited, had numerous letters of credit on deposit at The Valley National Bank and that all other letters of credit and negotiations concerning the General Commodities Corporation should be put through Mr. Taylor and The Valley National Bank at Phoenix, Arizona.

That subsequently thereto, on to-wit, October 11, 1947, your affiant met W. Thomas Davis, Vice President and Executive Director of the General Commodities Corporation at the Chicago, Illinois, airport and was introduced to him by Mr. Dave Caswell. That your affiant drove Mr. W. Tom Davis to the Blackstone Hotel in Chicago, Illinois; that W. Tom Davis thereupon stated that he was tired of traveling and that he had made all of the arrangements on the Islands and that he would be available at Phoenix, Arizona for the negotiation and consummation of any deals involving the sales of war surplus materials owned by the Republic of China; that thereupon, your affiant together with his group was to meet Mr. W. Tom Davis the following Sunday morning to discuss the entire war surplus situation. That subsequently thereto, on to-wit, October 12, 1947, in Room 1716 in the Blackstone Hotel in Chicago, Illinois your

affiant in the presence of Frank Siegmund, David Caswell, F. Harold Brasie, William O'Neil, Frank Smith, Charles Onishi and E. T. Moore had a preliminary discussion concerning the situation; that at that time a list of the materials on the Island of Tinia in the Pacific Ocean was given to your affiant to have a public stenographer make a copy thereof. That after the discussion [59] and before the close of the meeting, Mr. W. Tom Davis stated, "I assume that all of you are protected on your interest and commissions as I do not want any law suits, and when you have any parties or persons for the purchase of any of the war surplus materials, make arrangements to come to Phoenix to close the deal. I insist that all letters of credit must clear through The Valley National Bank at Phoenix, Arizona. I can be reached at the Westward Ho Hotel in Phoenix, Arizona, or through Frank Siegmund or Mr. Glen C. Taylor of The Valley National Bank".

Further your affiant sayeth not.

/s/ HOMER STEVENSON.

Subscribed and sworn to before me this 18th day of March, A. D. 1948.

(Seal) IMOGENE D. SMITH,

Notary Public.

My commission expires: Dec. 5, 1948.

[Endorsed]: Plaintiff's Memorandum of Points Authorities in opposition to Amended Motions of Defendants to Quash Return of Service of Summons and Dismiss Action, and Affidavits of Marvin Heaney and Homer Stevenson. Filed May 6, 1948.

## United States District Court

Office of the Clerk

District of Arizona

Phoenix, Arizona, May 18, 1948

The Attorney General,  
Washington, D. C.

Sir:

Re: Civ-1142 Phoenix, Frank M. Siegmund vs.  
General Commodities Corporation, Limited,  
an Hawaiian Corporation, et al.

I enclose herewith original certificate of the judge of this court under the Act of August 24, 1937, signed by the judge of this court as of this date.

I also enclose copies of the following pleadings as provided in the certificate:

1. Complaint, filed February 17, 1948.
2. Amended Motion to Dismiss of Defendant General Commodities Corporation, filed April 30, 1948.
3. Amended Motion of Defendant W. T. Davis, et al. to Dismiss, filed April 30, 1948.
4. Defendants' Memorandum in Support of Defendants' Motions to Dismiss, filed April 30, 1948.
5. Plaintiff's Memorandum in Opposition of Amended Motion to Dismiss, filed May 6, 1948.

Respectfully,

WM. H. LOVELESS,  
Clerk. [61]

[Title of District Court and Cause.]

CERTIFICATE UNDER THE ACT OF  
AUGUST 24, 1937

1. The Court, under the Act of August 24, 1937 (Title 28, Section 401, United States Code) hereby certifies to the Attorney General of the United States that the constitutionality of the Act of April 20, 1940 (Title 28, Section 41, sub-section (1)), is drawn in question in this action, to which neither the United States, any agency, nor any officer or employee thereof as such is a party.

2. The constitutionality of said Act is drawn in question in the following manner, to-wit: Defendants contend and will contend that said Act, which is pleaded in defendants motions to dismiss as exceeding the authority granted Congress in Article III, Section 2, of the Constitution, is unconstitutional, and that the Federal Courts have no jurisdiction in cases of alleged diversity of citizenship between citizens of states, and citizens of territories.

3. The Clerk of this Court is hereby directed forthwith to forward to the Attorney General of the United States this certificate, together with one copy of the pleadings herein.

4. If response is not made to this certificate within thirty days after mailing thereof and the pleadings to the Attorney General of the United States, the United States, unless cause shall be

shown, shall be deemed to have determined not to intervene in this action.

Dated at Phoenix, Arizona, this 18th day of May, 1948.

DAVE W. LING,  
United States District Judge.

[Endorsed]: Filed May 18, 1948. [62]

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Department of Justice  
Washington 25, D. C. hjd  
June 14, 1948

HGM:HIR 143-8-4

William H. Loveless, Esquire  
Clerk, United States District Court  
Phoenix, Arizona

Re: Frank M. Siegmund v. General Commodities Corporation, Limited, an Hawaiian Corporation, et al. In the United States District Court for the District of Arizona. No. Civ-1142 Phoenix.

Dear Mr. Loveless:

We have your letters of May 18 and May 20, 1948, enclosing the Court's certificate issued under the Act of August 24, 1937, certifying that the constitutionality of the Act of April 20, 1940, c. 117, 54 Stat. 143, has been drawn in question in this proceeding, and also enclosing copies of various pleadings in the case.

The Government does not desire to intervene in this case. It will, however, undoubtedly be of in-

terest to the Court that the very question raised here—the constitutionality of the 1940 statute—is also in issue in *National Mutual Insurance Company of the District of Columbia v. Tidewater Transfer Company, Inc.*, in the Supreme Court of the United States, No. 640, October Term, 1947. A writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit was granted in that case on March 29, 1948, in response to a petition filed by the insurance company, and a memorandum submitted by the Solicitor General for the United States as *amicus curiae*. It is contemplated that that case will be heard in the Supreme Court early in the 1948 Term, and the Government intends to submit a brief as *amicus curiae* in support of the 1940 statute. We shall be glad to send copies of the Government's brief in the case to you if the Court so desires.

Sincerely yours,

For the Attorney General:

/s/ H. G. MORISON,  
Assistant Attorney General.

[Endorsed]: Filed June 19, 1948. [63]

In the United States District Court for the  
District of Arizona

Civ.—1142—Phoenix

FRANK M. SIEGMUND,

Plaintiff,

vs.

GENERAL COMMODITIES CORPORATION,  
LIMITED, an Hawaiian Corporation, W. T.  
DAVIS, also known as W. THOMAS DAVIS,  
THE BLACK CORPORATION, THE WHITE  
CORPORATION, WM. H. HEEN, ERNEST  
K. KAI and THELMA M. AKANA,

Defendants.

### ORDER

This cause is dismissed for want of jurisdiction as to defendants General Commodities Corporation, Limited, an Hawaiian Corporation, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, the Court being of the opinion that the Act of Congress passed in 1940, 28 U.S.C.A. 41, amending Section 24, Subdivision 1 of the Judicial Code, is unconstitutional.

The Motion to Quash Return of Service of Summons and Dismiss Action as to defendant W. T. Davis, is denied.

It is so ordered.

Dated July 3, 1948.

DAVE W. LING,  
United States District Judge.

[Endorsed]: Filed and docketed July 3, 1948.



[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above named plaintiff, Frank M. Siegmund, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that portion of the order entered in this action on the 3rd day of July, 1948 dismissing this cause for want of jurisdiction as to the defendants, General Commodities Corporation, Limited, an Hawaiian Corporation, and Wm. H. Heen, Ernest K. Kai and Thelma M. Akana.

JAMES L. DeSOUZA and  
JOHN F. SULLIVAN,  
By JOHN F. SULLIVAN,  
Attorneys for Appellant, Frank  
M. Siegmund.

[Endorsed]: Filed July 23, 1948. [65]

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[Title of District Court and Cause.]

STIPULATION AND MOTION FOR EXTENSION OF TIME TO FILE RECORD ON APPEAL AND DOCKET APPEAL AND FOR FIXING OF TIME, AND ORDER EXTENDING AND FIXING TIME.

STIPLATION AND MOTION

Come now the Plaintiff and Appellant, Frank M. Siegmund, and the Defendant and Appellant, W. T. Davis, also known as W. Thomas Davis, and the Defendants and Appellees, General Commodi-

ties Corporation, Limited, Wm. H. Heen, Ernest K. Kai, and Thelma M. Akana, by their respective counsel, and stipulate that additional time is necessary for the parties to file their record on appeal and docket their respective appeals to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, and move the Court for an Order extending time and fixing the time for filing record on appeal and docketing their respective appeals in the above entitled cause, and that the time fixed therefor be the 13th day of October, 1948.

Dated this 28th day of August, 1948.

JAMES L. DeSOUZA and

JOHN F. SULLIVAN,

By JAMES L. DeSOUZA,

Attorneys for Plaintiff and Appellant Frank M. Siegmund. [66]

RAWLINS, DAVIS, CHRISTY  
& KLEINMAN,

By COMAR J. KLEINMAN,

Attorneys for Defendant and Appellant, W. T. Davis, also known as W. Thomas Davis, and for Defendants and Appellees General Commodities Corporation, Ltd., Wm. H. Heen, Ernest K. Kai and Thelma M. Akana.

### ORDER

The Court having read the foregoing stipulation and motion, and good cause appearing therefor,

It is hereby ordered that the time for filing

record on appeal and docketing appeal in the above-entitled action in the United States Circuit Court of Appeals for the Ninth Circuit is hereby extended to, and said time is hereby fixed at, the 13th day of October, 1948, including said day.

Dated this 30th day of Aug., 1948.

HOWARD C. SPEAKMAN,  
District Judge.

[Endorsed]: Order filed Aug. 31, 1948.

[Endorsed]: Stipulation and Motion filed Aug. 28, 1948. [67]

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[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED ON  
BY PLAINTIFF APPELLANT FRANK M.  
SIEGMUND ON APPEAL.

The plaintiff having taken his appeal to the United States Court of Appeals for the Ninth Circuit, from the order dismissing the above entitled cause made and entered on July 3, 1948, by the District Court of the United States for the District of Arizona hereby designates the following points to be relied upon in the prosecution of said appeal:

1. The District Court erred in dismissing this action as against the Defendants General Commodities Corporation, Limited, an Hawaiian corporation, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana.

2. The District Court erred in concluding that

the Act of Congress passed in 1940, 28 U.S.C.A. 41, amending Section 24, Subdivision 1, of the Judicial Code, is unconstitutional.

Dated this 27th day of September, 1948.

JAMES L. DeSOUZA and  
JOHN F. SULLIVAN,

By JAMES L. DeSOUZA,  
Attorneys for Plaintiff and  
Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 27, 1948. [68]

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[Title of District Court and Cause.]

PLAINTIFF AND APPELLANT FRANK M.  
SIEGMUND'S DESIGNATION OF RECORD  
ON APPEAL.

The plaintiff designates the following portions of the record in the above-entitled and numbered cause to be transmitted to the United States Court of Appeals for the Ninth Circuit, as the record of appeal in the above entitled cause:

1. Plaintiff's Complaint as amended by interlineation on March 22, 1948.

2. Minute entry of District Court Order of March 22, 1948, allowing amendment of Complaint by interlineation.

3. Summons with Marshall's return of Service upon defendants General Commodities Corporation, Limited, an Hawaiian corporation, W. T. Davis,

also known as W. Thomas Davis, William H. Heen, Ernest K. Kai and Thelma M. Akana.

4. Portions of deposition of Wm. H. Heen filed March 22, 1948, as follows:

- Page 2, line 19, to page 3, line 6, inclusive;
- Page 9, line 5 to line 8, inclusive;
- Page 13, line 15, to page 14, line 2, inclusive;
- Page 22, line 12, to page 23, line 6, inclusive;

5. Portions of deposition of Glen C. Taylor, filed March 22, 1948, as follows: [69]

- Page 6, line 12, to page 8, line 18, inclusive;
- Page 17, line 23, to page 18, line 5, inclusive;
- Page 20, line 23, to page 21, line 10, inclusive;

6. Portions of deposition of W. T. Davis, also known as W. Thomas Davis, filed April 5, 1948, as follows:

Unnumbered opening page, lines 11 to 26, inclusive;

- Page 1, line 1, to page 3, line 17, inclusive;
- Page 20, line 6, to page 21, line 24, inclusive;
- Page 22, line 10, to page 23, line 1, inclusive;
- Page 30, line 15, to page 31, line 20, inclusive;
- Page 32, line 16, to page 32, line 24, inclusive;
- Page 34, lines 6 to 19, inclusive;
- Page 39, lines 5 to 11, inclusive;
- Page 45, lines 5 to 19, inclusive;
- Page 47, line 25, to page 53, line 11, inclusive;
- Page 53, line 23, to page 54, line 10, inclusive;
- Page 55, lines 5 to 8, inclusive;
- Page 55, line 15, to page 56, line 3, inclusive.

7. Portions of Reporter's transcript of Hearing on Motions to quash return of service of Summons and dismiss action before the District Court, March 22, 1948, as follows:

Page 4, line 10, to page 38, line 26, inclusive.

8. Affidavit of Frank M. Siegmund, filed March 15, 1948.

9. Affidavit of Marvin Heaney, filed May 6, 1948.

10. Affidavit of Homer Stevenson, filed May 6, 1948.

11. Order of Dismissal dated July 3, 1948.

12. Notice of Appeal of Frank M. Siegmund, filed July 23, 1948.

13. Stipulation, Motion, and Order for extension of time to file record on Appeal and docket Appeal, and fixing time, filed August 31, 1948.

14. This designation of record. [70]

Dated this 27th day of September, 1948.

JAMES L. DeSOUZA and  
JOHN F. SULLIVAN,

By /s/ JAMES L. DeSOUZA,  
Attorneys for Plaintiff and  
Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 27, 1948. [71]

[Title of District Court and Cause.]

DEFENDANTS' DESIGNATION OF ADDITIONAL PORTIONS OF RECORD REQUIRED ON APPEAL.

The defendants, General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, hereby designate the following additional portions of the record to be contained in the record on appeal to the Circuit Court of Appeals of the Ninth Circuit, to-wit:

1. Affidavit of W. T. Davis in Support of Motions to Quash Return of Service and to Dismiss Action, filed on the 8th day of March, 1948;

2. Order granting Defendants leave to file Amended Motions to Quash Return of Summons and to Dismiss Action, filed on the 30th day of April, 1948;

3. Amended Motion of defendant, General Commodities Corporation, Ltd., to Quash Return of Service of Summons and Dismiss Action, filed on the 30th day of April, 1948;

4. Amended Motion of Defendants, W. T. Davis, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, to Quash Return of Service of Summons and Dismiss Action, filed on the 30th day of April, 1948;

5. Letter of Clerk and Certificate of Judge of said Court dated May 18, 1948, and filed same date, forwarded to Attorney General of the United

States, in regard to constitutionality of a Federal Act being raised in said action; [72]

6. Reply of Attorney General of the United States declining to intervene on behalf of the United States in said action, filed on the 19th day of June, 1948;

7. Portions of deposition of Wm. H. Heen, filed on the 22nd day of March, 1948, as follows:

Page 3, lines 7 to 15, inclusive;  
Page 9, lines 9 to 14, inclusive;  
Page 10, lines 18 to 25, inclusive;  
Page 13, lines 9 to 14, inclusive;  
Page 14, lines 3 to 12, inclusive;  
Page 27, lines 23 to 26, inclusive;  
Page 28, lines 1 to 10, inclusive;  
Page 28, lines 20 to 26, inclusive;  
Page 29, lines 1 to 4, inclusive;  
Page 31, lines 9 to 15, inclusive;

8. Portions of deposition of Glenn C. Taylor, filed on the 22nd day of March 1948, as follows:

Page 2, lines 15 to 26, inclusive;  
Page 6, lines 2 to 11, inclusive;  
Page 8, lines 23 to 26, inclusive;  
Page 9, lines 1 to 15, inclusive;  
Page 10, lines 11 to 26, inclusive;  
Page 11, lines 1 to 18, inclusive;  
Page 12, lines 3 to 8, inclusive;  
Page 18, lines 21 to 26, inclusive;  
Page 19, lines 1 to 9, inclusive;



Page 22, lines 25 and 26;

Page 23, lines 1 to 6, inclusive;

9. Portions of deposition of William Thomas Davis, filed on the 5th day of April, 1948, as follows:

Page 6, lines 10 to 13, inclusive;

Page 12, lines 17 to 26, inclusive;

Page 13, lines 1 to 11, inclusive;

Page 24, lines 23 to 26, inclusive;

Page 25, lines 1 to 12, inclusive;

Page 26, lines 6 to 26, inclusive;

Page 27, lines 1 to 8, inclusive;

Page 28, lines 3 to 11, inclusive;

Page 30, lines 2 to 14, inclusive;

Page 32, lines 25 and 26;

Page 33, lines 1 to 3, inclusive;

Page 33, lines 11 to 13, inclusive;

Page 35, lines 22 to 26, inclusive;

Page 36, lines 1 to 3, inclusive;

Page 37, lines 10 to 13, inclusive;

Page 38, lines 8 to 18, inclusive;

Page 39, lines 22 to 24, inclusive;

Page 45, lines 23 to 26, inclusive;

Page 46, lines 1 to 9, inclusive;

Page 46, lines 24 to 26, inclusive;

Page 47, lines 1 to 8, inclusive; [73]

Page 56, lines 5 to 16, inclusive;

Page 56, lines 24 to 26, inclusive;

Page 57, lines 1 to 26, inclusive;

Page 58, lines 1 to 17, inclusive;

10. This designation of additional portions of record on appeal.

Dated this 5th day of October, 1948.

RAWLINS, DAVIS, CHRISTY  
& KLEINMAN,

By WILLIAM G. CHRISTY,  
Attorneys for Defendants, General Commodities  
Corporation, Limited, Wm. H. Heen, Ernest K.  
Kai and Thelma M. Akana.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 5, 1948. [74]

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[Title of District Court and Cause.]

### ORDER

It appearing to the Court that the Plaintiff's Notice of Appeal was filed herein on July 23, 1948, and that the time for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the Ninth Circuit has heretofore been extended to and including October 13, 1948, and,

It further appearing to the Court that the Plaintiff's Designation of Record on Appeal was not filed herein until September 27, 1948, and that the Defendant's time within which to serve and file a designation of additional portions of the record, proceedings and evidence to be included, will not expire until October 7, 1948, and that the Clerk of this Court cannot prepare the record on appeal

until after the expiration of such time and transmit the same to the Court of Appeals for filing and docketing on or before October 13, 1948,

It is ordered that the Plaintiff's time within which to file the record on appeal and docket the appeal in the United States Court of Appeals for the Ninth Circuit be and it is extended to and including October 21, 1948.

Dated this 1st day of October, 1948, at Phoenix, Arizona.

DAVE W. LING,  
United States District Judge.

[Endorsed]: Filed Oct. 1, 1948. [75]

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### CLERK'S CERTIFICATE

United States of America,  
District of Arizona—ss:

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Frank M. Siegmund, Plaintiff, vs. General Commodities Corporation, Limited, an Hawaiian corporation, et al., Defendants, numbered Civ-1142 Phoenix, on the docket of said Court.

I further certify that the attached pages numbered 1 to 75, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the

endorsements of filing thereon, called for and designated in Plaintiff and Appellant Frank M. Siegmund's Designation of Record on Appeal, and Defendants' Designation of Additional Portions of Record Required on Appeal, filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record remaining on file in my office, with the exception of the portions of the Reporter's Transcript.

I further certify that the original of the Reporter's Transcript filed in said cause is transmitted herewith and made a part of the record on appeal herein.

I further certify that the plaintiff deposited the sum of \$250.00 cash on July 23, 1948, as and for plaintiff's cost bond on appeal and that said cash bond on appeal is now on deposit in the registry fund of this Court.

I further certify that the Clerk's fee for preparing and certifying this said transcript of record amounts to the sum of \$17.40 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 19th day of October, 1948.

(Seal)            /s/ WM. H. LOVELESS,  
Clerk. [76]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

FRANK M. SIEGMUND

was called as a witness by the defendants for cross examination, and having been first duly sworn, testified as follows:

Cross Examination

Mr. Rawlins:

Mr. Rawlins: This will be on cross examination under the Statute.

The Court: All right.

Mr. Rawlins: State your name.

A. Frank M. Siegmund.

Q. Where do you reside, Mr. Siegmund?

A. Phoenix, Arizona.

Q. Do you know Tom Davis?

A. I certainly do.

Q. And you entered into a contract of employment, or sales representative, with the General Commodities Corporation? A. I did.

Q. Where was that contract entered into?

A. In San Francisco. [4\*]

Q. At the Palace Hotel?

A. That is correct.

Q. Now, then, you returned to Arizona, is that correct? A. That is right.

Q. And then you assigned one-half of your con-

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\* Page numbering appearing at foot of page of original certified Reporter's Transcript.

(Testimony of Frank M. Siegmund.)

tract east of the Mississippi River, I believe, to an outfit called the H & H Associates?

A. It was not an assignment, no, it was a contract of employment.

Mr. Sullivan: Your Honor, may we ask — I think we are getting long far afield on the question of where the corporation is doing business. The question was on the assignment of his contract.

Mr. Rawlins: If the Court please, there are two points; the first is whether or not this action involves anything that was done in this State of Arizona. We think if the action involves contracts without the State of Arizona, then the Court has no jurisdiction for that reason; secondly, if the General Commodities is doing no business within the State of Arizona, under the rules of the Court, we are entitled to a dismissal, and one is interwoven with the other. I think the Court will find it is material in the argument that will be presented later. [5]

(Thereupon argument between Court and counsel.)

The Court: I don't know enough about it to rule intelligently on that feature of it. I don't know anything about this case. It is your lawsuit. I want to know all of the facts and all of the background.

The Witness: May I answer that question again a little more entirely?

The Court: What was the question, now?

(The question was read by the reported.)

The Witness: I can further state in respect to

(Testimony of Frank M. Siegmund.)

that, that under the terms of the contract, a part of my duties was to appoint sales agents and organize a sales force, and in the process of that organization I did appoint the H & H Associates and David H. Caswell as sales agents east of the Mississippi River.

Mr. Rawlins: Q. So now, have you a corporation? A. Am I a corporation?

Q. Yes, in that sense of the word.

A. No.

Q. Now, Mr. Siegmund, you contracted to represent the General Commodities in San Francisco, that is correct, isn't it? A. That is right.

Q. Now, you know that the General Commodities [6] is a Hawaiian corporation?

A. Yes, I know that.

Q. And you know Mrs. Thelma Akana, Ernest Kai and William Heen are residents of Honolulu?

A. Yes, I understand that to be true.

Q. And you know that Tom Davis is a resident of California?

A. I presume that is true, yes.

Q. You said so in your complaint?

A. Yes, I understand that is true.

Q. Now, what business, to your knowledge, has the General Commodities Corporation transacted in Arizona?

A. Well, there has been considerable business transacted in Arizona. In the first place, all of the dealings in the United States was supposed to clear through my office in Phoenix, Arizona.

(Testimony of Frank M. Siegmund.)

Q. That is, through you, as Frank Siegmund, sales agent?

A. That is right, and at various times we have brought out people, different buyers, to Phoenix to negotiate contracts and negotiate purchases.

Q. Who did you bring to Phoenix?

A. Personally?

Q. Yes.

A. I didn't bring anybody personally. I was [7] instrumental in having them brought here, though. I would say Jack Purdy, Bert Kaplan, and a lot of negotiations were handled from Phoenix by telephone by both myself and by Mr. Davis.

Q. Now, did you sign any contract at any time or at any place on behalf of the General Commodities Corporation?      A. No.

Q. There never was any deal concluded by you?

A. It was impossible to conclude a deal.

Q. Right. Do you know of your own knowledge of any deals that were signed in Phoenix?

A. That were signed in Phoenix?

Q. Yes, or in the State of Arizona.

A. I don't remember of anyone. I don't know whether any were concluded in Phoenix or elsewhere, but I know a lot of negotiations were handled in Phoenix.

Q. You do know that Bert Kaplan and Jack Purdy came down for negotiation?

A. Yes, sir.

Q. Has the General Commodities such an office in Phoenix?      A. Only the sales office.



(Testimony of Frank M. Siegmund.)

Q. That is your office? A. That is right.

Q. Do you have any other offices here?

A. None other than Mr. Davis made his headquarters in Phoenix a considerable part of the time.

Q. Mr. Davis is their Vice President?

A. That is correct.

Q. Mr. Davis has been here this winter, is that correct?

A. He has been here on numerous occasions last fall, last summer, and also this winter a considerable portion of the time.

Q. You know he has been in ill health a part of this time? A. Since December, yes.

Q. He has been in the hospital for a month or so? A. Since December, yes.

Q. Whatever business the General Commodities has done, to your knowledge, has been done by Mr. Davis as Vice President?

A. Yes, I presume so.

Q. They have no regularly established office?

A. No.

Q. They have no registered phone number?

A. No.

Q. There is no one else in Phoenix, Arizona, except Mr. Davis? [9]

A. No, no one else who could transact any business of the corporation except Mr. Davis.

Q. Now, other than what Mr. Davis may have done here on his visits would be all that you would know that the corporation did in Phoenix?

(Testimony of Frank M. Siegmund.)

A. That is right.

The Court: Does the corporation maintain an office in Hawaii?

A. They have an office, but I don't think they ever transacted any business there. All business has been transacted in the United States.

Mr. Rawlins: Pardon me, your Honor, have you any questions?

The Court: No.

Mr. Rawlins: Q. Now, the business of the corporation is buying from the Chinese Government scrap materials and heavy equipment that the Chinese Government received from the United States of America in the payment of some debt?

A. That is right.

Q. Now, was any of that surplus, I will say "surplus", or that equipment or material ever been moved into Arizona, do you know?

A. If it has been, it has been moved here by some companies—I don't know whether any of it has come into Arizona or not. [10]

Q. But the General Commodities has not moved any into Arizona?

A. No, there is no buyer here large enough to buy it.

Q. You talked to Jack Purdy and Kaplan, they are residents of Chicago, Illinois, isn't that right?

A. Yes.

Q. If they made any contract, assuming that they did, the surplus, or the material, would be delivered to them at some port and then they would distribute it anywhere they wanted?

(Testimony of Frank M. Siegmund.)

A. That is right.

Q. And the General Commodities was retailing in this country?

A. Not retailing, no, we sold in bulk to them.

Q. The General Commodities bought from China and sold through people throughout the United States?

A. Or the world.

Q. They never sold to anybody in Arizona, to your knowledge?

A. Not that I know of.

Q. These men came from Chicago; why, they came down to negotiate, and that is all there was to it.

A. That is right, and as that is in my sales office area, why, they naturally would come here or [11] I would go there.

Q. You mean to say you brought Bert Kaplan down here?

A. I didn't bring him, no, he came on the plane.

Q. I mean did they come at your expense?

A. No, it was my original contact, and they came here, I think, at Mr. Davis' request.

Q. What do you mean by your original contact?

A. I made the original contact with Mr. Kaplan.

Q. Whereabouts?

A. In Chicago.

Q. Nothing was done in Arizona to originally contact Mr. Kaplan?

A. Only by telephone.

Q. Only by telephone?

A. Yes.

Q. And you contacted Mr. Purdy in Chicago?

A. That is right.

Q. What other people did you contact?

(Testimony of Frank M. Siegmund.)

A. I have contacted an awful lot of them in the process of this transaction.

Q. Well, name some.

A. Well, I contacted company agents in Chicago who had other prospects.

Q. Who?

A. Buying agents in Chicago that were interested [12] in buying material. I have met and talked to quite a few buyers in San Francisco, one, I think, a paper company, Ken Royce. I met Mr. Michaels, talked to Mr. Michaels in San Francisco; Hyman Michaels Company, and in Chicago I have talked to numerous buyers of pipe, steel, and such as the Foster Company, Kaplan Company, Purdy Company. I don't recall the names of some of them. There is a large paper company there that I contacted, the name slips my mind, but I talked to—

Q. Now, these contacts in San Francisco of Ken Royce and Mr. Michaels were all made in San Francisco?

A. That is right.

Q. And the ones with Purdy and Kaplan people that you mentioned in Chicago were made on trips that you made to Chicago?

A. That is right.

Q. Do you have a name for your sales agency?

A. No, just Frank M. Siegmund Company.

Q. And that is the name you do business under here in Phoenix?

A. I do business under my own name, just Frank M. Siegmund, no company.

Q. You have concluded no sale here yourself?

(Testimony of Frank M. Siegmund.)

A. That was impossible. [13]

Q. Just answer yes or no, you didn't conclude any sale yourself? A. No.

Q. There has never been a sale concluded in Arizona by you? A. No.

Mr. Rawlins: That is all.

Redirect Examination

Mr. DeSouza:

Q. Mr. Siegmund, you are the exclusive sales representative for this corporation in the United States?

A. That is what my contract calls for.

Q. And pursuant to that contract, have you set up a national sales headquarters in the United States? A. I have.

Q. And where is that headquarters located?

A. Phoenix, Arizona.

Q. Where are the greater portion of sales by General Commodities Corporation made in reference to the entire world?

A. In the United States.

Q. In the United States?

A. All of them, I think. [14]

Q. This sales office through which the greater part of the sales of this corporation are carried out is at Phoenix, Arizona?

Mr. Rawlins: Now, wait a minute. If the Court please, we object to the form of that question for this reason: The man has testified he never concluded a sale. If he has done anything, it was to solicit.

(Testimony of Frank M. Siegmund.)

The Court: Yes.

Mr. DeSouza: I will ask you, what was the headquarters from which the greater portion of sales of this corporation were solicited?

A. Phoenix, Arizona, my office.

Q. Now, you testified that you set up a sales organization and had various representatives representing you? A. That is right.

Q. There was included the H & H Associates?

A. That is right.

Q. And Mr. Dave Caswell?

A. That is right.

Q. State whether or not those associates had to work through you in concluding the sales and the solicitation of sales?

A. Very definitely.

Q. Was there any contact on sales with the [15] Corporation on the part of anyone except through you? A. No, there was not.

Q. Mr. Siegmund, does the General Commodities Corporation maintain an office in Honolulu?

A. I understand they do, yes.

Q. Do you know what that office consists of as to space?

Mr. Rawlins: I object as being immaterial and irrelevant.

The Court: Oh, it doesn't make much difference.

A. One small office room, is my understanding.

Mr. DeSouza: Q. Do you know whether or not any substantial portion of the business of that corporation is conducted at its Honolulu office?

(Testimony of Frank M. Siegmund.)

A. I don't think any of it has been conducted.

Mr. Rawlins: Wait a minute. If the Court please, we ask that that be stricken because he says, "I don't think." He doesn't know anything about it, that is, in relation to Honolulu.

The Court: All right, it may be stricken.

Mr. DeSouza: Q. To your knowledge, has any sale ever been concluded through the Honolulu office? A. There is none, I understand.

Q. Has any sales solicitation taken place through the Honolulu office, of your own knowledge? [16]

A. Not of my own knowledge, no.

Q. You are acquainted with Mr. W. Thomas Davis? A. I am.

Q. And he is Vice President, I believe you testified, of the General Commodities Corporation?

A. That is correct.

Q. Will you state to the Court, if you know, who the person is, within the General Commodities Corporation, that has the authority to enter into transactions for the sale of merchandise?

Mr. Rawlins: Wait a minute, we object to that, without showing he knows of his own knowledge. It is not the best evidence, and the question is whether or not any transactions have been concluded in Arizona, I take it?

Mr. DeSouza: We are getting at that, I think.

The Witness: Mr. Tom Davis.

Mr. DeSouza: Q. Do you know whether anyone else in the organization has been concluding

(Testimony of Frank M. Siegmund.)

deals for the corporation other than Mr. Tom Davis?

A. I am sure there has not been anyone else.

Q. Do you know whether Mr. Tom Davis has at all times held the power of attorney of the General Commodities Corporation to enter into and conclude these transactions?

A. I am sure that he has. [17]

Q. What is the source of your information on that?

A. By correspondence, wires from the General Commodities office stating that at one time they withdrew the power of attorney, and again that they had reinstated it.

Q. How long a period elapsed, approximately, between the withdrawal and the reinstatement?

A. I believe it was five days.

Q. Where is Mr. W. Tom Davis' headquarters in the United States?

A. I would say at Phoenix, Arizona.

Q. Do you know what portion of his time he has spent at Phoenix, Arizona?

A. I would say more than any place else in the United States.

Q. As a general matter, whenever any purchaser desires to get in touch with Mr. W. Tom Davis, where have they been instructed to get in touch with him?

Mr. Rawlins: Wait a minute. If the Court please, I object to that as being irrelevant, immaterial and incompetent for any purposes in this



(Testimony of Frank M. Siegmund.)

matter. He doesn't know anything about it himself except he knows Davis lived here.

The Court: Did W. Tom Davis file a motion for [18] quashing return of service?

Mr. Rawlins: Yes, sir.

The Court: All right, go ahead, find out where his residence is.

Mr. DeSouza: Would you read the last question?

Mr. Rawlins: That was in the complaint, if the Court please, that he is a resident of California.

Mr. Sullivan: It does not say that.

Mr. DeSouza: He was not a citizen of California.

The Court: That is what gives the Court jurisdiction, it is citizenship.

Mr. DeSouza: The last question, your Honor, goes to the place where this corporation is transacting the major portion of its business.

(Argument between Court and counsel.)

The Court: Your authority to act for him was a contract you entered into with the Corporation?

A. That is right.

Q. That was a contract. The contract didn't say that you represented the corporation there to dispose of the property that it had, is that true?

A. I was appointed an exclusive sales representative and agent in the United States, and Mr. Davis at various times has told people that he had only one sales agent, and that was myself, and all [19] business would have to be transacted

(Testimony of Frank M. Siegmund.)

through me, but to further inform the Court as to the method of operation, it was not my deal to sell merchandise, actually make the sale. My Primary function, in my talks with Tom Davis, was to get the prospects for him, get him contacts, and he would negotiate the deal, because at no time did he ever give me sufficient information as to quantities or prices, or the quality of the merchandise that I could conclude a sale. At various times I have called him in Honolulu and had him come to the United States to negotiate a deal due to the lack of sufficient information for me to close the deal. In other words, it was a case of going out and locating the prospects and then contacting Mr. Davis and have him come and meet with these people and negotiate the deal to the best advantage to everyone.

The Court: Well, that was the only—

A. It was impossible to write a deal and close it.

The Court: That was your only employment with the company, to secure appointments and pick up these prospects?

A. That is right.

Q. You didn't represent the company in any other [20] way?

A. Other than contact. I was its exclusive sales representative in the United States. It took me all over the United States. I couldn't contact people in Phoenix except by telephone.

Mr. DeSouza: Q. Mr. Siegmund, you men-

(Testimony of Frank M. Siegmund.)

tioned a number of deals that had been transacted. Let me ask you a little further about the nature of this corporation. Is it a corporation that conducts a great many small deals, or a limited number of very large deals?

A. A very limited number of very large deals.

Q. What is the usual size of the deals in so far as the amount of money—

Mr. Rawlins: Wait a minute. If the Court please, I object to that as being irrelevant, immaterial and incompetent. This man has never been there and has never seen the contract. All he can do is by merest hearsay. I could develop that on voir dire, but I don't see any need of going into that, whether we made one sale for a dollar, or one sale for a million dollars. The sole question before the Court is, was or was not this corporation doing business in Arizona sufficiently for this Court to take jurisdiction, not only for the purpose of this man recovering on any contract that [21] was made in California, but for the purpose of ordering an accounting of the corporation, and of the corporation that is in Honolulu, and whether or not there has been enough business done here. It makes no difference, I take it, whether it is a million dollars or a half million dollars. I don't care if he tells us, but he doesn't know. All he knows is by hearsay.

A. I disagree with you.

The Court: Go ahead, you may answer.

A. I have in my possession a photostatic copy

(Testimony of Frank M. Siegmund.)

of a letter of credit on a deal that was made for approximately \$647,000. I know what that deal was, because I know when the letter of credit was executed.

Mr. Rawlins: Where was that?

A. In San Francisco, and further than that, I don't know of any deals that were for a lesser amount than that. I mean they were all for that or more. It was not a case of handling a lot of little deals. It was a case of negotiating large deals with large letters of credit, such a half million dollars, or a million, or three million dollar letter of credit, and that took time. You couldn't do it—you couldn't go in and offer a man a thousand cases of something and take his [22] order and ship it. It had to be in boat loads, and it involved considerable money and considerable negotiations both as to financial arrangements and deliveries in quantities, and things like that, and I do know this, further, that Mr. Davis has informed several buyers and several people that he only had but one representative in the United States, and all business in the United States would have to be transacted through me in Phoenix. He has made that statement to several people.

Mr. DeSouza: Q. Now, you mentioned Mr. Jack Purdy. Who is he?

A. Jack Purdy is, I believe he is the Vice President of the Purdy Company in Chicago. They are very large equipment dealers.

Q. And who is Mr. Bert Kaplan that you mentioned?

(Testimony of Frank M. Siegmund.)

A. Bert Kaplan is the partner or an officer of the company of A. S. Kaplan Company, Chicago. They are reputed to be the largest scrap dealers in the world.

Q. They are in Chicago too?

A. They are in Chicago, yes.

Q. Now, at whose request did Mr. Purdy and Mr. Kaplan come to Phoenix?

A. Well, I didn't call them and tell them to [23] come here. Mr. Davis did that after he got back to the United States, but it was subsequent to their coming here or subsequent to a meeting, that Mr. Davis and myself had with them in Chicago. He entered into primary negotiations there and I understood they later flew to San Francisco and after that, why, they flew here to Phoenix and met Mr. Davis.

Q. What was the purpose of their coming here to Phoenix?

A. To negotiate the scrap deal. I might add further that after Mr. Davis talked with them, he advised me that we were really in the scrap business and we would make more money out of this than we ever had before in our life.

Q. Are you acquainted with a corporation known as the Admiralty Trading Company?

A. I am not acquainted with it personally. It is my understanding it is the A. S. Kaplan Company and the Purdy Company combined. They formed a new corporation to handle the scrap deal.

Q. Do you know whether any scrap deals were

(Testimony of Frank M. Siegmund.)

handled by way of sales to the Admiralty Trading Company?

A. It is my understanding the entire scrap deal was handled that way. [24]

Q. The Admiralty Trading Company, you say, is composed of Mr. Purdy and Mr. Kaplan, who came to Phoenix to negotiate?

A. That is right. I might also add that I made preliminary negotiations with both in this conversation.

Mr. Rawlins: In Chicago?

A. In Chicago, yes. You can't have people to come out to Phoenix to talk about scrap. You have to go see them for a deal of that size.

Mr. DeSouza: Q. Do you recall of any sale of merchandise by the corporation to the Indonesian Government, or its purchasing agents, that was ever contemplated?

A. Contemplated, yes, I do know it was contemplated.

Q. Do you know whether anyone came to Phoenix, Arizona, on behalf of the Indonesian Government? A. Yes, I do.

Q. Did you see those persons personally?

A. Yes.

Q. What was the nature of the deal then contemplated?

A. It was to purchase soft goods line in Manus in the South Pacific in any quantity of it.

Q. What was the approximate amount involved [25] in that deal?

(Testimony of Frank M. Siegmund.)

Mr. Rawlins: I object, no showing made that any deal was ever contemplated. As a matter of fact, it was not.

The Court: It was not completed, Mr. Siegmund?

The Witness: I don't know. I have not been kept informed under the terms of the contract.

The Court: The amount involved would not make any difference.

Mr. DeSouza: We were merely showing the size and the amount negotiated whether they went through or not.

The Court: Well, that didn't go through on this one so what difference does it make?

Mr. DeSouza: Well, our point of trying to bring it out, your Honor, is to show they were negotiating on a hundred million dollar deal in Phoenix.

The Court: Well, Mr. Siegmund was?

Mr. DeSouza: No, Mr. Davis was.

The Court: Davis was a resident of California, a citizen of California, according to the pleadings.

Mr. DeSouza: Your Honor, may I again state our position on that?

The Court: You don't have to now. I have got [26] to determine whether this corporation is subject to the jurisdiction of this Court. That is what I am interested in.

Mr. DeSouza: That is what we are trying to get to. We are saying that Mr. Davis was acting under a power of attorney from this corporation, and as Vice President.

(Testimony of Frank M. Siegmund.)

The Court: All right, go ahead.

The Witness: What was the last question?

The Court: The last one I sustained the objection. There wasn't any deal consummated.

Mr. DeSouza: Q. Are you acquainted with Mr. Heen, Mr. Kai and Mrs. Akana?

A. I know Mrs. Akana. I met Mr. Heen. I have never met Mr. Kai. I have seen him.

Q. What is their position with the company, if any?

A. They are officers of the corporation.

Q. Do you know whether they have ever come to Phoenix, Arizona?

A. I do. Yes, they have.

Q. When were they last here, if you know?

A. About 45 days ago, during February, I think it was.

Q. Do you know the purpose of their coming here?

A. Yes. I presume the purpose of their coming [27] here was to negotiate a deal with the Indonesian Trading Corporation and also to negotiate the steel deal with the Chinese. The Chinese Government even had their representatives here to negotiate the steel deal.

Q. Did you ever see Mr. Heen in company with the Indonesian Government representatives in Phoenix?

A. I never personally saw him, no. I understood he was there, but I never saw him.

Q. Directing your attention to the evening be-



(Testimony of Frank M. Siegmund.)

fore this complaint was filed, did you on that occasion see Mr. Heen at the Cathay Gardens Restaurant? A. Yes, I did, that is right.

Q. In whose company was he at that time?

A. Oh, with Charles Onishi and other members who I presumed to be members of the Indonesian Trading Commission. They were strangers to me. I didn't know who they were. In other words, your Honor, it is my opinion that under the terms of my contract, I was supposed to be kept advised as to what was going on as to price, and everything like that, but they failed to fulfill that part of the contract. I made the initial contact with my agents in Chicago, made the initial contact with the Indonesians, and at that time I called Mr. Davis [28] at Honolulu and had him meet us in Chicago to negotiate and to consummate the deal, and they could not get together on the deal right at that time, or at least Mr. Davis didn't seem inclined to negotiate a deal with them, and then the General Commodities Corporation—Mr. Davis apparently figured they would deal around me and get the Indonesians to come out here and make a deal, a contract with Mr. Davis. I contacted him several times and tried to find out if the Indonesians had ever made a deal, or if further negotiations had been made, and they told me no. That was in Phoenix, in February, and I found out that Tom, every time I asked that question that the Indonesians were here, so I don't think there has been any doubt about their endeavors on the part of the

(Testimony of Frank M. Siegmund.)

General Commodities Corporation to circumvent the contract or deprive me—

The Court: That part is all right, you may have a cause of action, but you will have to place it in the right jurisdiction.

The Witness: I do not know the Indonesians were here to negotiate a sale in Phoenix.

Mr. DeSouza: Q. Now, you spoke of renegotiation on the steel deal. By that do you refer to this often publicized \$37,000,000 Bethlehem [29] Steel scrap deal? A. Yes, I do.

Q. Do you know who, if anyone, was here representing the Chinese Government in Phoenix on that deal?

A. All I know is what I read in the paper. I presume it to be authentic. Several Chinese Generals were here.

Q. They weren't here seeing you in connection with it?

A. No, sir; they were here negotiating the purchase of that.

The Court: With Mr.—

The Witness: With Mr. Davis, and the officials and other officers of the company. They were all here negotiating and transacting business in Phoenix.

Mr. SeSouza: Q. How is payment made for the purchase of merchandise from the General Commodities Corporation?

A. By letters of credit.

Q. Do you know where those letters of credit

(Testimony of Frank M. Siegmund.)

are placed for the benefit of the General Commodities Corporation?

A. Some of them, or at least a portion of them were placed in the Valley National Bank at Phoenix. [30]

Q. Have you ever had any instructions from any officers of the General Commodities Corporation as to where letters of credit were to be placed?

A. Yes, they could be placed with the Valley National Bank at Phoenix or the Naval Bank at Guam.

The Court: The what?

A. The Naval Bank at Guam.

Mr. Rawlins: Did you ever place them?

A. Personally, no, I didn't buy any.

Mr. DeSouza: Q. But you do know of your own knowledge that several letters of credit were placed with the Valley National Bank?

A. That is right.

Q. And that thereafter payment to the General Commodities Corporation for these large deals were made at Phoenix, Arizona? A. That is right.

Mr. Rawlins: Now, wait a minute, if the Court please. You don't know whether any of those letters of credit were ever bought or not, do you?

A. I don't know whether they were ever paid, no.

Q. You don't know whether they were assigned to the Bank of America in San Francisco, do you?

A. Assigned to the Bank of America?

Q. Yes. [31] A. No.

Q. The only letter of credit you ever saw was in

(Testimony of Frank M. Siegmund.)

San Francisco, is that right?      A. Yes.

Q. Anything about the Valley Bank is just what you conjecture from what somebody told you?

A. As far as the Valley National Bank, yes, that is true.

Mr. DeSouza: Q. Have you ever heard any official of the Valley National Bank discuss having letters of credit to the General Commodities Corporation at the Valley Bank?      A. Yes.

Mr. Rawlins: I object to that. That has not been done in the presence of the defendants.

Mr. DeSouza: It was done in the presence of—

The Court: I know, but if that becomes necessary to have that information, call somebody from the Valley Bank.

Mr. DeSouza: Your Honor, we have here a deposition of Mr. Glen C. Taylor, the Vice President of the Valley National Bank, in which he admits having such letters of credit.

The Court: Well, that settles that.

Mr. Rawlins: That is not true what that deposition says. [32]

The Court: Well, it is argument.

Mr. DeSouza: Q. Has Mr. Davis ever stated to you that all letters of credit should clear through the Valley National Bank at Phoenix, Arizona?

Mr. Rawlins: We object to that unless the foundation has been laid.

The Witness: Not all of them, no.

Mr. DeSouza: Q. How long has Mr. Davis been in Phoenix, Arizona?

(Testimony of Frank M. Siegmund.)

A. How long has he been in Phoenix?

Q. Yes. A. You mean recently?

Q. Since the formation of this corporation, yes.

A. I think he has been here since just before Christmas.

Q. Are you acquainted with Mr. William O'Neil? A. I am.

Q. And who is Mr. William O'Neil?

A. Mr. William O'Neil is a merchandise broker in Chicago.

Q. Are you acquainted with Mr. Homer Stevenson? A. I am.

Q. Who is Mr. Homer Stevenson?

A. Homer Stevenson is the President of the H & H Associates Company.

Q. Are you acquainted with Mr. Marvin Heaney? [33] A. No, I am not.

Q. Do you know who Mr. Marvin Heaney is?

A. I understand he is a broker on the Pacific Coast and an associate of Mr. O'Neil.

Q. Directing your attention to October 12th, 1947, did you on that date attend a conference in Room 1716 in the Blackstone Hotel in Chicago, Illinois, at which there were present besides yourself, Mr. David Caswell, Mr. F. Harold Brasie, Mr. William O'Neil, Mr. Frank Smith, Mr. Charles Onishi, and Mr. E. T. Moore?

A. Yes, I was there; in fact, I called the meeting.

Q. Was Mr. Thomas W. Davis there?

A. Yes, I had Mr. Davis fly in from Honolulu there.

(Testimony of Frank M. Siegmund.)

Q. Did Mr. Davis at that time make any statement as to where the letters of credit should clear?

A. That time, and subsequent to that, they were supposed to be placed with the Valley National Bank. Prior to that, it was the Naval Bank at Guam.

Q. He so stated that in the presence of these persons? A. That is right.

Q. Did he state where he, meaning Mr. Davis, could be reached? [34]

A. Well, he could always be reached through me here in Phoenix. I can add to that, if it is permissible, that I think the major portion of Mr. Davis' business has always been transacted in the Valley Bank in Phoenix.

Mr. Rawlins: That is his, individually?

The Witness: That is right.

Mr. DeSouza: I think that is all. I'd like to call one additional witness, your Honor.

The Court: All right.

(The witness was excused).

Mr. DeSouza: Call Mr. Caswell.

### DAVID H. CASWELL

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

#### Direct Examination

Mr. DeSouza:

Q. Will you state your name, please?

A. David H. Caswell.

Q. Where do you reside?

A. 902 West Avalon Drive, Phoenix.

(Testimony of David H. Caswell.)

Q. What is your business, Mr. Caswell?

A. I am a furniture sales representative.

Q. Are you acquainted with Mr. Frank Siegmund? [35] A. I am.

Q. Are you acquainted with Mr. W. Thomas Davis? A. I am.

Q. Have you ever participated in any of the dealings on behalf of the General Commodities Corporation to obtain purchasers for its merchandise?

A. I have.

Q. What was your connection in the deal with regard to Mr. Frank Siegmund?

A. Mr. Siegmund made me his partner or his representative in Chicago.

Q. Made you his representative?

A. That is right.

Q. Now, directing your attention to October 12th, 1947, did you at that time attend a meeting in Room 1716 of the Blackstone Hotel in Chicago, Illinois, at which there were present Mr. Frank Siegmund, yourself, Mr. F. Harold Brasie, Mr. William O'Neil, Mr. Frank Smith, Mr. Charles Onishi, Mr. E. T. Moore and Mr. W. Thomas Davis? A. I did.

Q. On that occasion did Mr. Davis make any statement to the group as to where letters of credit for merchandise purchased should be filed?

A. He did.

Q. And where did he say to have them filed?

A. The Valley National Bank at Phoenix, Arizona.

(Testimony of David H. Caswell.)

Q. Did Mr. Davis state where he could be located at any time?

A. He stated he could be located at any time through Mr. Frank Siegmund.

Mr. DeSouza: That is all.

Cross Examination

Mr. Rawlins:

Q. Where did you first meet Mr. Davis?

A. Palace Hotel in San Francisco.

Q. Now, at the Palace Hotel in San Francisco, you were there at the time this contract was entered into with Siegmund?

A. I was there during the negotiations.

Q. You were there during the negotiations?

A. That is correct.

Q. Now, what is your deal with Siegmund?

A. That I should represent him in Chicago and all over the country and make all contacts possible.

Q. Have you got a written contract with him?

Mr. DeSouza: If the Court please, we think it is immaterial whether this man has a written contract with Frank Siegmund. That has nothing to do with whether this corporation is doing business in Arizona, as far as I can see. [37]

The Court: I don't know. This man was doing business in Chicago for the corporation. Mr. Siegmund was doing business in Phoenix for the corporation.

Mr. Rawlins: Well, the object in finding out if he had a written contract is to find out if he is a party to the complaint, that is why I want to know if he had a written contract.



(Testimony of David H. Caswell.)

The Court: Well, if he didn't have a written contract with the corporation, you don't have to worry about that.

Mr. Rawlins: Were you a party to the serving of notice on the corporation that you had an interest in the Siegmund contract?

A. No, sir.

Q. Now, you attended this meeting in Chicago and the one in San Francisco? A. Yes.

Q. Who is E. T. Moore?

A. He is an employee of the H & H Associates.

Q. In Chicago? A. Right.

Mr. Rawlins: That is all.

Mr. DeSouza: That is all; we have nothing more.

The Court: That is all.

(Witness excused).

[Endorsed]: Filed Sept. 27, 1948. [38]

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[Endorsed]: No. 12068. United States Court of Appeals for the Ninth Circuit. Frank M. Siegmund, Appellant, vs. General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed October 21, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the  
Ninth Circuit

No. 12068

FRANK M. SIEGMUND,

Appellant,

vs.

GENERAL COMMODITIES CORPORATION,  
LIMITED, an Hawaiian corporation, WM. H.  
HEEN, ERNEST K. KAI, and THELMA M.  
AKANA,

Appellees.

STATEMENT OF POINTS TO BE RELIED  
ON BY APPELLANT, FRANK M. SIEG-  
MUND, ON APPEAL

The appellant, Frank M. Siegmund, hereby states the following points to be relied upon by him in the prosecution of his Appeal:

1. The District Court erred in dismissing this action as against the defendants, General Commodities Corporation, Limited, an Hawaiian corporation, Wm. H. Heen, Ernest K. Kai, and Thelma M. Akana.

2. The District Court erred in concluding that the Act of Congress, passed in 1940, 28 U.S.C.A.

41, amending Section 24, Subdivision 1 of the Judicial Code, is unconstitutional.

Dated this 30th day of October, 1948.

JAMES L. DeSOUZA and  
JOHN F. SULLIVAN,

By /s/ JAMES L. DeSOUZA,  
Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed November 1, 1948. Paul P.  
O'Brien, Clerk.



IN THE  
**United States**  
**Court of Appeals**  
**For the Ninth Circuit**

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**FRANK M. SIEGMUND,**

*Appellant,*

**vs.**

**GENERAL COMMODITIES CORPORATION,  
LIMITED, WM. H. HEEN, ERNEST K. KAI  
and THELMA M. AKANA,**

*Appellees.*

**Appeal from the District Court of the United States  
for the District of Arizona (Ling, J.)**

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**APPELLANT'S BRIEF**

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**JAMES L. DeSOUZA  
JOHN F. SULLIVAN**

*Attorneys for Appellant.*



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IN THE  
**United States**  
**Court of Appeals**  
**For the Ninth Circuit**

---

FRANK M. SIEGMUND,

Appellant,

vs.

GENERAL COMMODITIES CORPORATION,  
LIMITED, WM. H. HEEN, ERNEST K. KAI  
and THELMA M. AKANA,

Appellees.

Appeal from the District Court of the United States  
for the District of Arizona (Ling, J.)

---

**APPELLANT'S BRIEF**

---

**STATEMENT OF THE CASE**

This is an appeal from an order (R. 68) of the United States District Court for the District of Arizona (Ling, J.) dismissing a complaint (R. 2) brought by the appellant as to the defendants, General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana for a sum exceeding \$3000, for want of jurisdiction by reason of the findings of the court that the Act of Congress passed in 1940, 28 U. S. C. A. 41, amending Section 24, Sub-section 1, of the Judicial Code, is unconstitutional. From that order this appeal has been taken.

The appellant is a citizen of the State of Arizona and sued in the United States District Court for the District of Arizona, jurisdiction being based on diversity of citizenship. The appellees are all citizens of the Territory of Hawaii.

## STATUTE INVOLVED

Section 41 (1) of Title 28 United States Code provides as follows:

“41. (Judicial Code, Section 24) Original Jurisdiction

The district courts shall have original jurisdiction as follows:

(1) United States as plaintiff; civil suits at common law or in equity.

First. Of all suits of a civil nature . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000 and . . .

(b) Is between citizens of different States *or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory.* . . .” (Italicized part added by amendment of April 20, 1940.)

## CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8:

The Congress shall have the power:

Sub-Section 9. “To constitute tribunals inferior to the Supreme Court.

Sub-Section 18. To make all laws which shall be necessary and proper for carrying into execu-

tion the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.”

#### Article III, Section 1:

“The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.”

#### Article III, Section 2:

Sub-section 1. “The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.”

#### Article IV, Section 3:

Sub-section 2. “The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property

belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.”

## QUESTIONS INVOLVED

1. Can a suit be maintained by a citizen of the State of Arizona in the District Court of the United States for the District of Arizona against citizens of the Territory of Hawaii where jurisdiction is based on diversity of citizenship?

2. Is the Act of Congress of April 20, 1940, 28 U. S. C. A. 41, amending Section 24, Sub-division 1 of the Judicial Code, expressly allowing citizens of a state to maintain suits in the District Courts of the United States against citizens of the Territory of Hawaii, constitutional?

## SUMMARY OF ARGUMENT

The constitutionality of the April 20, 1940, amendment to Section 41 (1) of Title 28 United States Code, upon which jurisdiction is founded in this action, has never been ruled upon by the United States Supreme Court, although the precise question here involved was heard by that Court in the October, 1948, term and is, at this writing, under advisement.

The United States Supreme Court has never construed Article III, Section 2 of the Constitution of the United States to exclude from the Federal Courts actions between a citizen of a state and a citizen of a territory, and that section of the Constitution cannot be reasonably so construed.

In interpreting the true meaning of the Constitution the courts will look to contemporary history for

a determination of the intention of the framers of the Constitution, considering the mischief which the framers intended to prevent and the nature of the remedy which they employed to that end. In the case of the diversity of citizenship provisions of Article III, Section 2, contemporary history and writings reveal the purpose of the Section to have been a guarantee that the citizens of the United States, in actions against a citizen of another jurisdiction in the United States, would not be required to resort to local tribunals which might be influenced by local considerations, favoritism and prejudice, but would always have open to them a Federal Court free from such influence. At the time the Section was enacted Hawaii was not in existence as a Territory of the United States and the foregoing considerations and purposes apply as strongly to actions between citizens of a state and of a territory as to actions between citizens of different states. Thus the word "states" as contained in the Section should not be construed to exclude territories.

The power of Congress to enact the 1940 amendment to the diversity statute is not confined to Article III, Section 2, but may be found elsewhere in the Constitution.

## ARGUMENT

### I.

THE UNITED STATES SUPREME COURT  
HAS NEVER CONSTRUED ARTICLE III,  
SECTION 2 OF THE CONSTITUTION TO  
EXCLUDE FROM THE FEDERAL COURTS  
ACTIONS BETWEEN A CITIZEN OF A  
STATE AND A CITIZEN OF A TERRITORY.

The amendment of April 20, 1940, to the diversity of citizenship statute (Judicial Code, Section 24 (1), 28 U. S. C. A., Section 41, Subd. (1) has been construed a number of times by the courts with conflicting determinations as to its constitutionality.

The amendment has been held constitutional in *Winkler v. Daniels*, 43 F. Supp. 265 (E. D. Va.); *Glaeser v. Acacia Mutual Life Association*, 55 F. Supp. 925 (N. D. Calif.); and *Duze v. Woolley*, 72 F. Supp. 422 (D. Hawaii).

The 1940 amendment has been held unconstitutional in *Central States Cooperatives v. Watson Bros. Transportation Co.*, 165 F. 2d 392 (CCA 7), and *National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co., Inc. of Virginia*, 165 F. 2d, 531, (CCA 4), and in a number of district court cases; *Behlert v. James Foundation of N. Y.*, 60 F. Supp. 706 (S. D., N. Y.), *McGarry v. City of Bethlehem*, 45 F. Supp. 385 (E. D., Pa.), *Ostrow v. Samuel Brilliant Co.*, 66 F. Supp. 593 (D. C. Mass.) and *Wilson v. Guggenheim*, 70 F. Supp. 417 (E. D. S. Car.).

The two Circuit Court of Appeals decisions cited above, *Central State Cooperatives v. Watson Bros. Transportation Co.*, and *National Mutual Insurance Co. v. Tidewater Transfer Co.*, each contain strong dissenting opinions with authorities holding the 1940 amendment to be constitutional.

While the constitutionality of the 1940 amendment has never been ruled upon by the Supreme Court of the United States, that Court did, on the 29th day of March, 1948, grant certiorari in the *National Mutual Insurance Co.* case and hearing has been had thereon in the October, 1948 term (Su-



preme Court, October, 1947 term No. 640, now October, 1948 term No. 29). That case, at this writing, is under advisement.

Article III, Section 2 of the Constitution has never been construed by the United States Supreme Court insofar as the question of diversity of citizenship between a citizen of a state and a citizen of a territory or of the District of Columbia is concerned. In fact, that Court has expressly declined to construe the meaning of the words "controversies between citizens of different states" as used in the constitution (Article III, Section 2) as distinguished from the Judiciary Act. (*Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 71, 60, S. Ct. 44, 47; 84 L. Ed. 85, 89-90.)

The question of whether an action may be maintained in the Federal District Courts between a citizen of a state and a citizen of a territory, or of the District of Columbia first arose with regard to the right as to a citizen of the District of Columbia in the leading decision by Chief Justice Marshall in *Hepburn and Dundas v. Ellzey*, 2 Cr. 445, 6 U. S. 445; 2 L. Ed. 332, in which the great Chief Justice held that jurisdiction did not exist. It is to be noted, however, that in the *Hepburn* case Chief Justice Marshall did not mention Article III, Section 2 of the Constitution, nor attempt to construe it, stating only that the jurisdiction of the Court "*depends on the Act of Congress describing the jurisdiction of the Court.*" In that case, Chief Justice Marshall stated:

"It is true that as citizens of the United States and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the Courts of the United States, which are open to aliens, and to the citizens of every state in the Union, should be closed to them. *But*

*this is a subject for legislative and not for judicial consideration.”* (Italics supplied.)

The language of the above quotation, and particularly the emphasized portion thereof, clearly shows that while Congress had not, at that time, seen fit to extend the rule of diversity of citizenship to citizens of the District of Columbia, it had the power to do so unprohibited by the Constitution, that being a legislative function, and the language seems subject to no other logical interpretation.

Chief Justice Marshall, in the *Hepburn* case, attempted to construe only the language of the Judiciary Act of 1789 insofar as it related to diversity of citizenship and that he was construing that Act of Congress only, and not Article III, Section 2 of the Constitution is reiterated in his language in the later case of *New Orleans v. Winter*, 1 Wheat. 91, 94, 14 U. S. 91, 94, where he stated, in holding that a citizen of a territory could not sue a citizen of a state in the Federal Courts, as follows:

“Every reason assigned for the opinion of the Court, (*in Hepburn and Dundas v. Ellzey*) that a citizen of Columbia was not capable of suing in the courts of the United States *under the Judiciary Act*, is equally applicable to a citizen of a territory.” (Italics supplied.)

Prior to the 1940 amendment to *Judicial Code, Section 24 (1)*, a number of decisions have held that a citizen of a state could not sue a citizen of a territory or the District of Columbia in the Federal District Courts, but all of such decisions have been based upon the language and reasoning of *Hepburn and Dundas v. Ellzey*, and have construed only the language of the Judiciary Act and not the Constitution.

Typical is the language of Mr. Justice Miller, in *Barney v. Baltimore City*, 6 Wall. 280, 73 U. S. 280:

“In the case of *Hepburn and Dundas v. Ellzey*, it was decided by this Court, speaking through Marshal, C. J. that a citizen of the District of Columbia was not a citizen of a State *within the meaning of the Judiciary Act*, and could not sue in a Federal Court.” (Italics supplied.)

See also *Hooe v. Jamieson*, 166 U. S. 395, 17 S. Ct. 596, following the *Hepburn* case, and expressly construing only the Judiciary Act of 1789.

It is, therefore, plain that *Hepburn and Dundas v. Ellzey* and the decisions which have followed it may not be construed to interpret the language of the constitution, Article III, Section 2. As stated in *Cohens v. Virginia*, 6 Wheat. 264, 399:

“It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they will be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”

## II

ARTICLE III, SECTION 2 OF THE CONSTITUTION CAN NOT BE CONSTRUED TO EXCLUDE FROM THE FEDERAL COURTS ACTIONS BETWEEN A CITIZEN OF A STATE AND A CITIZEN OF A TERRITORY.

All presumptions are in favor of the validity of this statute and it should not be declared unconstitutional unless the conflict with the Constitution is clear beyond a reasonable doubt. This principle of

law is fundamental and has been re-affirmed many times by the Supreme Court.

“It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.” *U. S. v. Del. & Hudson Co.*, 213 U. S. 366, 407, 53 L. Ed. 836, 849 (1909).

*Brown v. State of Maryland*, 12 Wheat. 419, 25 U. S. 419, 436;

*Alaska Packers Assn. v. Industrial Accident Commission of California*, 294 U. S. 532, 543; 51 S. Ct. 92, 75 L. Ed. 276.

An Act of Congress can be declared void only when it violates the Constitution clearly, palpably and plainly, in such manner as to leave no doubt or hesitation in the court's mind. The Appellee has the burden of meeting this strict requirement which has been firmly and unequivocally laid down by the courts through the years.

It is well established that the Constitution must be interpreted in the light of prior and contemporaneous history and of the conditions and circumstances under which the Constitution was framed. The Court must look to the mischief intended to be remedied and to the remedy intended to be provided, fitting the intention of the framers of the Constitution to conditions as they exist today. Thus, Chief Justice Marshall in *Gibbons vs. Ogden*, 9 Wheat. (U.S.) 1, 6 L. Ed. 23, said:

“This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought

they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? . . . . . As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case . . . . . We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.”

and Mr. Justice Story, *Prigg vs. Commonwealth of Pennsylvania*, 16 Pet. (U. S.) 539, 10 L. Ed. 1060, stated with reference to interpretations of the Constitution:

“It will, indeed, probably be found, when we look to the character of the Constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures as well as the known historical fact that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it, which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. And, perhaps, the safest rule of interpretation after all will be found to be to look to

the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed."

Mr. Justice Peckham, further stated the rule in *Maxwell vs. Dow*, 176 U. S. 581, 20 S. Ct. 448, 44 L. Ed. 597 as follows:

"The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein, any doubtful expression in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted."

See also Cooley, C. J., *People v. Harding*, 53 Mich. 481, 485; 18 N. W. 555, 19 N. W. 155.

The fact that the word "states" as contained in the Judiciary Act of 1789 has been construed to mean only the states of the American confederation as distinguished from territories and the District of Columbia, in no way requires that such a construction be given the word as it appears in Article III, Section 2, of the Constitution.

It is well established that identical language in the Constitution and in a statute may be given different interpretations in the Constitution than in the statute. *Lamar v. U. S.*, 240 U. S. 60, 65; 36 Supreme Court 255, 257. The rule is well stated by Professor Chaffee of Harvard Law School in an article "Federal Interpleader Since the Act of 1936", 49 Yale Law Journal 377, 395, as follows:

"Constitutional language may properly be given a wider interpretation than statutory lan-

guage. Since the Constitution has broader purpose than a statute, and is intended to last for a much longer time, its wording should possess a flexibility which is not needed in a statute."

Looking to the evil which the framers of the Constitution attempted to remedy by enacting Article III, Section 2, it is apparent that the purpose intended requires that the word "states" as therein contained should be interpreted to include the territories and the District of Columbia, and that Congress was intended to have vast powers of organization over the judiciary.

Alexander Hamilton in "*The Federalist*" No. LXXX, clearly expressed this view when he analyzed the judicial branch of the National Government. In his discussion of Article III of the Constitution he said:

"From this review of the particular powers of the federal judiciary, as marked out in the constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such *exceptions*, and to prescribe such regulations, as will be calculated to obviate or remove these inconveniences. The possibility of particular mischiefs can never be viewed, by a well-informed mind, as a solid objection to a principle, which is calculated to avoid general mischiefs, and to obtain general advantages." (Italics in original.)

This thought is reiterated by Mr. Justice Chase in a note to *Turner v. Bank of America*, 4 Dall. 810 (1799) as follows:

“The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this court, we possess it, not otherwise; and if Congress has not given the power to us, or to any other court, it still remains at the legislative disposal”.

The federal courts were given jurisdiction in diversity of citizenship cases to insure fair disposition of suits brought by citizens of one state in the courts of another state. (2 *Curtis History of Constitution of the United States*, 441-444.) The intentions of the framers of the Constitution and the contemporary attitude as to Article III, Section 2, are well expressed by James Madison:

“As to its cognizance of disputes between citizens of different states, I will not say it is a matter of such importance. Perhaps it might be left to the state courts. But I sincerely believe this provision will be rather salutary, than otherwise. It may happen that a strong prejudice may arise in some states, against the citizens of others, who may have claims against them. We know what tardy, and even defective administration of justice, has happened in some states. A citizen of another state might not chance to get justice in a state court, and at all events he might think himself injured.” 5 *Writings of James Madison*, 219.

The well expressed purposes of the framers of the Constitution in enacting Article III, Section 2, to insure that the citizens of every state would find open to them in another jurisdiction a tribunal unbiased by local consideration and without favoritism toward local citizens, applies with equal force to citizens of



the territories and of the District of Columbia. It is inconceivable that those men who enacted the Constitution intended to grant this safeguard to one group of citizens of the United States, while denying it to another group of citizens. Chief Justice Marshall was in complete accord with this view when he said of the citizens of the District of Columbia in *Hepburn and Dundas v. Ellzey* (supra) :

“It is extraordinary that the courts of the United States which are open to aliens and to citizens of every State in the Union, should be closed to them.”

and it is only right that he should have, by inference, directed the Congress to rectify the omissions of the Judiciary Act of 1789 by stating:

“But this is a subject for Legislative and not for Judicial consideration.”

There is no reason whatever why the word “*states*” as contained in Article III, Section 2, of the Constitution, and never heretofore construed by the Supreme Court, should not be interpreted to include the territories and the District of Columbia, and the purpose of that section, as above stated by Madison, would seem to require such an interpretation. That word has been construed many times by the courts, sometimes to include the territories and the District and sometimes to exclude them. As stated in 29 *Georgetown Law Journal* 193, 198, referring to interpretations of the word as used in the Constitution :

“If a numerical recapitulation were made of the instances in which the word ‘states’ has been considered as including the District of Columbia, and the territories, and in the instances in which it has not, undoubtedly the former would be the larger of the totals. It is not suggested that a numerical superiority should be the con-

trolling factor in a determination of this matter. However, it is indicative that the Supreme Court has not been concerned with consistency in interpreting this phase of the Constitution.”

Because the sections of the Constitution applicable thereto refer only to “states” and do not mention territories, or the District of Columbia, who would logically contend that the Territory of Hawaii may, for example, enter into a treaty, alliance or confederation, coin money, pass bills of attainder and ex post facto laws, grant titles of nobility, lay imposts or duties on imports or exports, keep its own troops or ships of war, enter into agreements or compacts with foreign powers, or engage in war (Article I, Section 10) or that the Territory may assume or pay a debt or obligation incurred in aid of insurrection, or rebellion against the United States, or a claim for the loss or emancipation of a slave (Amendments, Article XIV, Section 4), or deny to a citizen of the United States the right to vote by reason of race, color or previous condition of servitude, (Amendments, Article XV, Section 1), or by reason of sex (Amendments, Article XIX, Section 1), or that Congress must apportion income taxes collected from within the territories or the District of Columbia (Amendments, Article XVI). Numerous other instances exist within the Constitution where a narrow interpretation of the word “states” would have an equally ridiculous result.

The words “shall extend to” contained in Article III, Section 2, of the Constitution, are not words of limitation as to the judicial power of the United States, but are plainly words of grant guaranteeing to the people that they shall have that much protection under the judicial power which can not be denied

them by Congress, and Congress has the power to grant the people protection under the judicial power in excess of that expressly stated in Article III, Section 2. The words "shall extend to" as used, do not prohibit Congress from extending the benefits of the judicial power of the United States to citizens other than those expressly enumerated in Article III, Section 2. *Winkler v. Daniels*, 43 F. Supp. 265; 39 Words and Phrases 135; 39 Words and Phrases, Pocket part, page 26. As stated in 21 Tulane Law Review 177, referring to Chief Justice Marshall's statement that "this is a subject for Legislative consideration" the authors say:

"The statement can have but one meaning; Marshall felt that the constitution allowed the revision of the diversity clause either under a broad interpretation of Article III, or by authority of some other constitutional provision."

and see also 11 George Washington Law Review 258:

"Chief Justice Marshall made it plain that the scope of the Court's jurisdiction was within the power of Congress to determine, and the Act as it then read did not embrace the District of Columbia as a 'State'. Thus, it can be seen that this decision, to which all subsequent courts have alluded in deciding the same question, *by no means closed the door to Legislative extension . . . .*" (Italics supplied.)

As one of the framers of the Constitution, James Madison stated, *supra*, it was the intention that Article III, Section 2, should prevent local discrimination which it now appears is as applicable to the territories as to the States of the Union, and as Alexander Hamilton stated, *supra*, it was intended that the Congress should have great latitude in preventing excep-

tions and inconveniences and prescribing regulations to obviate and remove these inconveniences.

### III

THE POWER OF THE CONGRESS TO EXTEND THE JURISDICTION OF THE FEDERAL COURTS TO ACTIONS BETWEEN CITIZENS OF A STATE AND CITIZENS OF A TERRITORY IS NOT DERIVED SOLELY FROM ARTICLE III, SECTION 2, OF THE CONSTITUTION BUT MAY BE FOUND ELSEWHERE IN THAT INSTRUMENT.

The power of Congress to prescribe the jurisdiction of the Courts of the United States is not derived alone from Article III, Section 2 of the Constitution and not limited thereby, such power having been granted to Congress under a number of other Articles of the Constitution. *Winkler v. Daniels*, 43 F. Supp. 265; *Duze v. Woolley*, 72 F. Supp. 422; *O'Donoghue v. United States*, 289 U. S. 516.

Thus, the preamble of the Constitution itself states the purpose of that instrument to be, among other things, "to establish justice and promote the general welfare and secure the blessings of liberty to ourselves and our posterity . . . ." Likewise, Article I, Section 2, Clause 1, gives Congress the power to ". . . . provide for . . . . the general welfare of the United States," and Article I, Section 8, Clause 9, gives Congress the power "to constitute tribunals inferior to the Supreme Court" and Article I, Section 8, Clause 18, gives Congress the power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer

thereof". The foregoing references to the Constitution of the United States show the granting of power to Congress to establish courts and a judicial system and, as a necessary incident thereof, the power to prescribe the jurisdiction of such courts.

It has been said that the "due process" clause of the 5th Amendment accords to citizens of the United States who are not citizens of a state that protection which is accorded to citizens of a state by the "equal protection of the laws" clause of the 14th Amendment. Thus, a denial by Congress of the right of one group of citizens to redress in the Courts of the United States, where that right is given to another groups of citizens, would certainly seem violative of the "due process" clause of the 5th Amendment.

It would likewise seem futile to argue that any segment of the citizenry of the United States should be denied the privileges and immunities guaranteed under Article IV, Section 2, Clause 1, of the Constitution.

Article IV, Section 3, Clause 2, of the Constitution reads as follows:

"The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular state."

This would seem beyond any question to authorize the Congress to prescribe the judicial system to exist in any territory and the jurisdiction of the courts therein, and also to prescribe the rights of the citizen of such a territory to the use of the courts of the

United States, and the rights of any other citizen of the United States with respect to the use of the courts of the United States in actions by or against a citizen of such territory. The above quoted section of the Constitution must be very liberally construed for it is the principal source of the rights of Congress with respect to the territories. It would appear that the Amendment of April 20, 1940, to Judicial Code, Section 24 (1) is fully justified under the powers extended to Congress under the foregoing section of the Constitution. The section of the Constitution last quoted is analogous to Article I, Section 8, Clause 17, of the Constitution which has been held to justify the Amendment of April 20, 1940, as to the diversity of citizenship with regard to citizens of the District of Columbia (*Winkler v. Daniels, supra*). In fact, it has been stated that Article IV, Section 3, Clause 2, grants greater power to Congress with regard to the Territory of Hawaii than does Article I, Section 9, Clause 17, with regard to the District of Columbia (*Dykes and Keefee, the 1940 Amendment to the Diversity of Citizenship Clause*, 21 Tulane Law Review 171, 175).

An examination of the historical background with regard to the relationship of the Government of the United States with the Republic of Hawaii and the Territory of Hawaii further justifies the Amendment of April 20, 1940, heretofore referred to. Prior to 1898, the Government of the Republic of Hawaii offered to the Government of the United States a treaty providing for the ceding of the Republic of Hawaii to the United States and its annexation to the United States. While it does not appear with certainty that the treaty referred to was actually entered into by the Government of the United States, the

offer therein made by the Government of the Republic of Hawaii was formally accepted by the Government of the United States by a Joint Resolution of Congress approved July 7, 1898, and set forth in *30 U. S. Stats. at Large, Pages 750-751*, which contains the provisions for the judicial power of the Territory until Congress made further provisions.

By the Act of April 30, 1900, commonly referred to as the Hawaiian Organic Act which is set forth in *31 U. S. Stats. at Large, Pages 141-162*, Congress did prescribe a complete form of government for the Territory of Hawaii, declaring all citizens of the Republic of Hawaii to be citizens of the United States (Section 4) and that the Constitution of the United States and all laws of the United States which were not locally inapplicable should have the same force and effect within the Territory of Hawaii as elsewhere in the United States (Section 5). Section 86 of the Organic Act established a United States District Court within the Territory of Hawaii and provided that said Court should have the ordinary jurisdiction of District Courts in the United States and Circuit Courts and that the Judge, District Attorney, and Marshal of said Court should have, within the Territory of Hawaii, all the powers conferred by the Laws of the United States upon the Judges, District Attorneys, and Marshals of the District and Circuit Courts of the United States. Section 86 further prescribes the same extent and procedure of appeal to the Appellate Courts of the United States as are allowed the corresponding courts within the states and the same procedure as to other matters and proceedings as between courts of the United States and the courts of the several states was declared to exist between the courts of the United States and the

courts of the Territory of Hawaii. Such actions by Congress in accepting the offer contained in the treaty submitted by the Republic of Hawaii and relied upon by the citizens of that Republic, would appear to have virtually the status of a treaty under the treaty power granted by the Constitution.

All of the foregoing must be construed in the light of the 9th Amendment to the Constitution of the United States which provides as follows:

“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the People.”

The entire subject of the constitutionality of the April 20, 1940, Amendment to Judicial Code, Section 24 (1); 28 U. S. C. A., Section 41, Subd. (1), is excellently and completely discussed by John A. Dykes and Arthur J. Keeffe, Professor of Cornell University Law School in an article “*The 1940 Amendment to the Diversity of Citizenship Clause,*” 21 Tulane Law Review, 171 (December, 1946), cited with approval in *Duze v. Woolley*, 72 F. Supp. 422, which treats all of the conditions pro and con, as to such constitutionality and resolves all of them in favor of constitutionality, supporting such holdings with adequate authority. See also 5 Louisiana Law Review, 478, 55 Yale Law Journal 600, 11 George Washington Law Review 258, 21 Texas Law Review 83, 21 Tulane Law Review 171, XLV Columbia Law Review 125, 29 Georgetown Law Journal 193.

See also *House of Representatives, 76th Congress, 3rd Session report No. 1756* covering the 1940 Amendment to Judicial Code, Section 24 (1).



## CONCLUSION

For the foregoing reasons it is submitted:

1. That the true purpose of the diversity of citizenship clause, Article III, Section 2, requires its application to citizens of the territories and the District of Columbia.

2. That the Territory of Hawaii is a "state" within the meaning of Article III, Section 2.

3. That Congress, in the exercise of its power to legislate for the welfare of the citizens of the Territory of Hawaii, under Article IV, Section 3, Clause 2, properly permitted actions to be maintained by or against citizens of the Territory of Hawaii in all Federal Courts.

4. The changing requirements of our modern civilization necessitate a lenient interpretation of the Constitutional provisions with which we are here concerned directed toward the maintenance of justice for all of our nation's citizens, and the framers of the Constitution so intended. To withhold from the citizens of the territories and of the District of Columbia the right to sue in our Federal Courts, where diversity of citizenship exists, creates an illogical situation that Congress has properly moved to correct.

It is therefore earnestly urged that the District Court erred in dismissing the Appellant's complaint as to the Appellees, and that the Court's order should be reversed.

Respectfully submitted,

JAMES L. DeSOUZA  
JOHN F. SULLIVAN

*Attorneys for Appellant*



**United States  
Court of Appeals  
For the Ninth Circuit**

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**FRANK M. SIEGMUND,**

**Appellant,**

**vs.**

**GENERAL COMMODITIES CORPORATION,  
LIMITED, WM. H. HEEN, ERNEST K. KAI  
and THELMA M. AKANA,**

**Appellees.**

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**APPELLEES' MOTION TO DISMISS APPEAL  
and  
APPELLEES' BRIEF ON APPEAL**

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**Appeal from the United States District Court  
for the District of Arizona**

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**RAWLINS, DAVIS, CHRISTY &  
KLEINMAN,**

**Attorneys for Appellees.**

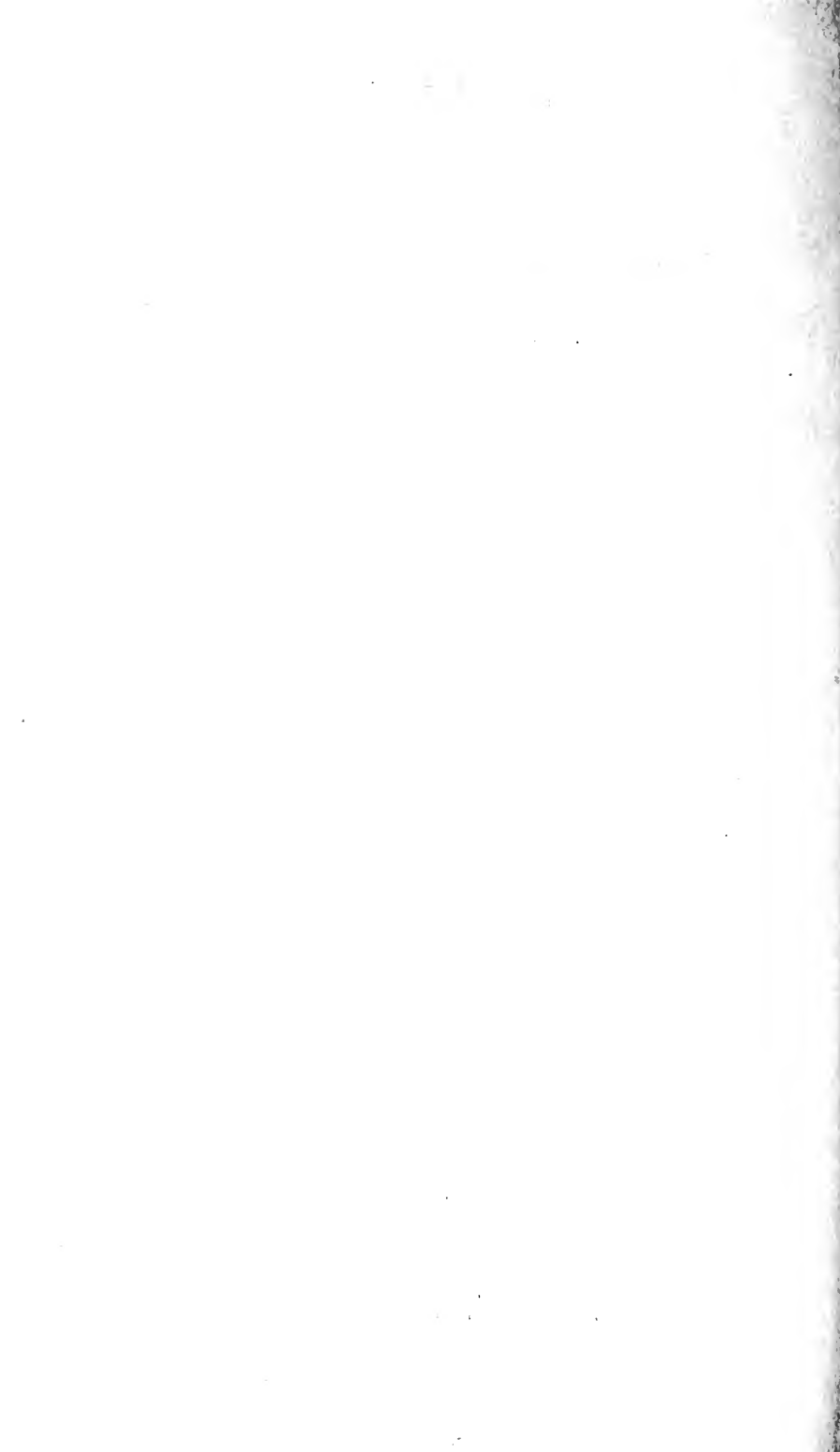
**FILED**

**JAN 25 1949**

**PAUL P. O'BRIEN,**

**CLERK**





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IN THE  
United States  
Court of Appeals  
For the Ninth Circuit

FRANK M. SIEGMUND,

Appellant,

vs.

GENERAL COMMODITIES CORPORATION,  
LIMITED, WM. H. HEEN, ERNEST K. KAI  
and THELMA M. AKANA,

Appellees.

APPELLEES' MOTION TO DISMISS APPEAL  
and  
APPELLEES' BRIEF ON APPEAL

MOTION TO DISMISS APPEAL

The Appellees, General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, respectfully move the United States Circuit Court of Appeals to dismiss the appeal of the Appellant, Frank M. Siegmund, in the above-entitled matter, upon the grounds hereinafter set forth.

## GROUND NUMBER I.

### JURISDICTION OF CIRCUIT COURT OF APPEALS

The Circuit Court of Appeals is without jurisdiction to entertain said purported appeal, for the reason that the order attempted to be appealed from is not a final appealable order.

### STATUTE INVOLVED

Section 128 of the Judicial Code (43 Stat. L., 936, U.S.C.A. Title 28, Section 225) provides:

“Appellate Jurisdiction—(a) Review of final decisions.

The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title.”

### STATEMENT OF FACTS INVOLVED

The action involved was brought in the District Court by Frank M. Siegmund, as plaintiff, against General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai, Thelma M. Akana, W. T. Davis, The Black Corporation, and The White Corporation, as defendants. The present appeal (R. 69) was taken by the Appellant, Frank M. Siegmund, from an order (R. 68) of the District Court dismissing the action as to the defendants, General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, who are Appellees herein. The

action still stands in the District Court as against the defendants, W. T. Davis, The Black Corporation and The White Corporation.

The complaint (R. 2 to 16) is based primarily upon a written contract entered into between the General Commodities Corporation, Limited, and the plaintiff, under which said corporation employed plaintiff to act as its sales representative, and agreed to pay him a percentage of any net profit made in dealing in certain war surplus commodities. (R. 3 to 6)

Briefly stated, the substance of the complaint, after setting out the contract, is as follows: That the defendants, Wm. H. Heen, Ernest K. Kai, Thelma M. Akana and W. T. Davis, organized the defendant corporation, General Commodities Corporation, Limited, (R. 13) and are its officers; (R. 15) that the defendants, The Black Corporation and The White Corporation, are subsidiary corporations which have been, or are to be organized by the defendant, General Commodities Corporation, Limited; (R. 9) That, through plaintiff's efforts, substantial profits have been made, and will be made in the future by the defendant, General Commodities Corporation, Limited; (R. 7, 8 and 9) That plaintiff is entitled to be paid a percentage of such profits under the terms of said contract, but that the defendant, General Commodities Corporation, Limited, has refused to account to, or pay plaintiff any part thereof; (R. 8 and 9) That the defendants have conspired together to defraud the plaintiff of his rights and the payments due him under said contract by diverting all of the net profits made by said corporation to the defendants, Wm. H. Heen, Ernest K. Kai, Thelma

M. Akana and W. T. Davis; (R. 14 and 15) That upon completion of said transactions said corporation will be dissolved and divested of all its assets; (R. 13) That plaintiff has been damaged thereby in the sum of Two Million Dollars. (R. 15) The complaint then prays judgment against all of the defendants jointly for the sum of Two Million Dollars, and for an accounting from the defendants, and certain ancillary relief. (R. 11 and 15) A more detailed statement of the contents of the complaint is found at pages 10 to 14 of Appellee's Brief, following the present motion.

The action, as to all of the defendants, arises out of the same subject matter, and it is sought to hold all of the defendants jointly liable therein. The present appeal has been taken by Appellant notwithstanding that the action still remains standing in the District Court as to the defendants, W. T. Davis, The Black Corporation and The White Corporation. (R. 68-69)

## POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

### POINTS OF LAW

Where the action arises out of the same principal subject matter as against all of the defendants, and the relief sought is against all of the defendants jointly, an order dismissing the action as to only part of the defendants is an interlocutory order and not a final order or judgment from which an appeal can be taken.

The action seeks to recover against all of the defendants jointly upon the same principal facts or subject matter. Under the circumstances the District

Court's order dismissing the action as to only part of the defendants, and leaving the action standing as to the other defendants, is not a final appealable order, and the Appellant's attempted appeal therefrom should be dismissed for the reason that this Appellate Court is without jurisdiction to entertain such purported appeal.

## AUTHORITIES

The foregoing proposition of law, and its application to the facts in the present appeal are amply sustained by the following authorities:

Hohorst vs. Hamburg-American Packet Co., 148 U.S. 262, 13 Sup. Ct. 590, 37 L.Ed. 443;

National Bank of Rondout, N. Y., vs. Smith, 156 U.S. 330, 15 Sup. Ct. 358, 39 L. Ed. 441;

Kuhn, et al, vs. Canteen Food Service, Inc., et al, 150 Fed. (2) 55, (7th Ct.);

Huntzman vs. New Orleans Public Service, Inc., 119 Fed. (2) 465, (5th Ct.);

Atwater vs. North American Coal Corporation, 111 Fed. (2) 125, (2nd Ct.);

Schultz, et al, vs. Manufacturer's & Trader's Trust Co., 103 Fed. (2) 771, (2nd Ct.);

Moss, et al, vs. Kansas City Life Insurance Co., 96 Fed. (2) 108, (8th Ct.);

Fields, et al, vs. Mutual Benefit Life Insurance Co., 93 Fed. (2) 559, (4th Ct.);

Bush, et al, vs. Leach, et al, 22 Fed. (2) 296, (2nd Ct.).

The rule is also followed in the State Courts when similar appeal statutes are involved. See:

Beavers vs. Beavers, 55 Ariz. 122, 99 Pac. (2) 95;  
and Annotations in 80 A.L.R. at 1186, and 114  
A.L.R. at 759.

## GROUND NUMBER II

That Appellant has failed to set forth in his brief any specifications of error as required by the rules of this Appellate Court, and no questions of error are presented for review.

## RULE INVOLVED

Rule 20, Sub-division 2(d), of the rules of this Appellate Court provides:

“\*\*\* 2. This brief shall contain, in order here stated— \* \* \* \* \*

(d) In all cases save those of admiralty, a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged.”

## POINTS AND AUTHORITIES

Since no specifications of error are set forth in Appellant's Brief, no question of error is presented to this Court for review. This Appellate Court has repeatedly held that where the alleged error is not specified in Appellant's Brief, as required by said rule, such error will not be considered. See the following recent cases:

United States v. Cushman, 136 F. 2d 815 at 817 (9th Ct.);

Chapman Bros. Co. v. Security-First Nat. Bank, 111 F. 2d 86 at 88 (9th Ct.);


Southern Pac. Co. v. Humphrey, 97 F. 2d 29 at 30 (9th Ct.);

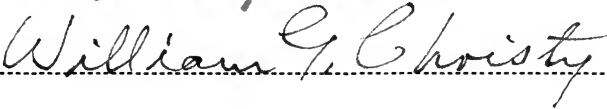
Century Indemnity Co. v. Nelson, 90 F. 2d 644 at 646 and 647 (8th Ct.);

Muyres v. United States, 89 F. 2d 793 at 784 (9th Ct.).

It is respectfully submitted that the order attempted to be appealed from is not a final appealable order, and this Appellate Court is without jurisdiction of such purported appeal; That in the absence of specifications of error in Appellant's Brief, no question of error is presented; That the appeal should be dismissed for said reasons.

RAWLINS, DAVIS, CHRISTY & KLEINMAN,

By  .....

By  .....

Attorneys for Appellees

## APPELLEES' BRIEF

### JURISDICTION OF DISTRICT COURT

The District Court was without jurisdiction as to the defendants (Appellees herein), General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, in said action, as hereinafter more fully appears.

### STATUTES INVOLVED

The Judicial Code, Section 24, as amended (Title 28 United States Code, Title 28, Section 41 (1), provides as follows:

“Original jurisdiction. The district courts shall have original jurisdiction as follows:

(1) United States as Plaintiff; Civil suits at common law or in equity. First. Of all suits of a civil nature, at common law or in equity, \* \* \* where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and \* \* \* \* \*

(b) is between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory, \* \* \* \* \*.”

### CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Article III, Section 2, Sub-section 1, provides:

“The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their au-



thority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

### QUESTIONS PRESENTED

1. Is the Act of Congress of April 20, 1940, amending Section 24, Subdivision 1, of the Judicial Code (U.S.C. Section 41) in conflict with the provisions of Article III, Section 2, Subdivision 1, of the Constitution, insofar as said act purports to confer jurisdiction on the United States District Court for the District of Arizona in an action by a citizen of said state against a citizen of the Territory of Hawaii?

2. Does the complaint state a cause of action against the defendants, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, Appellees herein?

3. Can a party to a contract with a corporation, providing that he is to be paid as commissions a percentage of the net profits on sales made by the corporation, maintain an action against the officers of the corporation, who are not parties to the contract, merely because the corporation refuses to pay such commissions and the officers have or will divert the net profits of the corporation to themselves, where such party has not first exhausted his remedies against the corporation and the corporation is not insolvent?

## STATEMENT OF THE CASE

The action was commenced in the United States District Court for the District of Arizona, by Frank M. Siegmund, as plaintiff, against General Commodities Corporation, Limited, an Hawaiian corporation, W. T. Davis, The Black Corporation, The White Corporation, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, as defendants. (R. 2)

As jurisdictional averments, the complaint alleges: That the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars; (R. 3) That the Plaintiff, Frank M. Siegmund, is a resident and citizen of the State of Arizona; That the defendant, General Commodities Corporation, Limited, is a corporation organized and existing under the laws of the Territory of Hawaii, and a citizen of said territory; That the defendant, W. T. Davis, is a resident and citizen of the State of California; That the defendants, The Black Corporation and The White Corporation, are non-resident, foreign corporations; That the defendants, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, are residents and citizens of the Territory of Hawaii. (R. 2-3)

The complaint attempts to set forth two causes of action arising out of the same subject matter, in each of which it is sought to hold all of the defendants jointly liable. The first cause of action (R. 2 to 12) is in substance as follows:

That the plaintiff entered into a written contract with the defendant, General Commodities Corporation, Limited, under the terms of which plaintiff was

appointed as said corporation's sales representative in the United States for the purpose of selling certain surplus commodities to be purchased by said corporation from the Republic of China, and that the plaintiff was to be paid for his services commissions of twenty percent of the net profits derived from such sales by said corporation. (R. 3 to 6) That pursuant to said contract, plaintiff secured customers for, and negotiated the sale of large quantities of such commodities, from which the defendant, General Commodities Corporation, Limited, has received, and in the future will receive substantial net profits, and that twenty percent of such net profits will be in excess of Two Million Dollars. That the General Commodities Corporation, Limited, has refused to account to plaintiff, or to pay him any part of such profits. (R. 7, 8 and 9) That by reason of the refusal of the defendants to comply with said contract, plaintiff is damaged in the amount of Two Million Dollars. (R. 9) That the records and the proceeds and net profits of said sales are in the custody and control of the defendants, General Commodities Corporation, Limited, The Black Corporation, and The White Corporation, and constitute their principal assets. That a substantial portion of said moneys and net profits are within the jurisdiction of the Court, and that said moneys and net profits are being dissipated by said corporations, and will be removed from the court's jurisdiction, unless a receiver is appointed to take charge of same. (R. 10-11) Judgment is then prayed against the defendants in substance, as follows: That an account be taken of all of said transactions; that the rights and duties of the

plaintiff and said defendant corporations under said contract be determined; that a receiver be appointed to take over all the property and assets of said corporations; that plaintiff have specific performance of said contract; and that plaintiff have damages against the defendants, and each of them in the amount of Two Million Dollars. (R. 11-12)

The second cause of action replays by reference the major portions of the first cause of action, (R. 12-12) and, in substance, further alleges: That the defendants, General Commodities Corporation, Limited, was formed by the defendants, W. T. Davis, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, for the purpose of carrying out the transactions referred to in said contract, and that upon completion of said transactions, said corporation will be dissolved and divested of its assets; (R. 13) That said defendants are engaged in a conspiracy to defraud the plaintiff of his rights and the payments due him under said contract, by causing the net profits of said transactions to be distributed to the defendants, W. T. Davis, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana; That a substantial portion of said net profits have been distributed to said last named defendants, and that future distribution of all of said net profits will be made to said last named defendants; (R. 14-15) That said defendants, W. T. Davis, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, are officers of the corporation defendant, General Commodities Corporation, Limited; (R. 15) That by reason of the defendants' said acts, the plaintiff has been damaged in the sum of Two Million Dollars. (R. 15) Judgment is then prayed against the de-

endants, and each of them, in the amount of Two Million Dollars. (R. 15-16)

Service was attempted to be obtained on the defendant, General Commodities Corporation, Limited, by serving its officer, W. T. Davis, when in the State of Arizona. No service was obtained upon the defendants, The Black Corporation and The White Corporation. The defendants, W. T. Davis, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, were each personally served when temporarily in the State of Arizona. (R. 17a-17b)

The defendant, General Commodities Corporation, Limited, then filed a Motion to Quash the Return of Summons as to it, and to dismiss the action upon the grounds that the District Court was without jurisdiction of the action and of said defendant, in that it was a corporation organized and existing under the laws of the Territory of Hawaii, and not a resident or citizen of any state, and that said action was not a controversy between citizens of different states and that it was not doing business in the State of Arizona, and was not subject to service of process therein. (R. 58-59)

The defendants, W. T. Davis, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, filed joint Motions to Quash the Return of Service of Summons on them, and to dismiss said action as to each of them, upon the grounds that the District Court was without jurisdiction of the action, in that the defendants, General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, were all residents and citizens of the Territory of Hawaii,

and not citizens of different states, and upon the further ground that said complaint failed to state a claim upon which relief could be granted as against said defendants. (R. 56-57)

The District Court dismissed the action as to the defendants, General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, but denied the motion of W. T. Davis, and the action still stands in the District Court as against the defendants, W. T. Davis and The Black Corporation and The White Corporation. (R. 68) The present appeal has been taken by the plaintiff, Frank M. Siegmund, from that portion of the order which dismissed the action against said first mentioned defendants. (R. 69)

## ARGUMENT

### POINT OF LAW NUMBER I.

The Act of Congress of April 20, 1940, amending Section 24, Subdivision 1, of the Judicial Code (U.S.C. Section 41) is in conflict with the provisions of Article III, Section 2, Sub-division 1, of the Constitution, insofar as said act purports to confer jurisdiction on the United States District Court for the District of Arizona in an action by a citizen of said state against a citizen of the Territory of Hawaii.

Appellant, to establish jurisdiction of the District Court in the action, as against the Appellees, relies on diversity of citizenship between Appellant, as a citizen of the State of Arizona, and the Appellees, as citizens of the Territory of Hawaii, basing same on the provisions of Section 24, Sub-division 1, of the

Judicial Code (U.S.C. Section 41), as amended by the Act of Congress of April 20, 1940. It is the contention of Appellees that the power of Congress to confer jurisdiction on the United States District Courts in the various states must arise from the provisions of Article III, Section 2, Sub-division 1, of the Constitution. This provision is the basic source of the Federal judicial power, insofar as the jurisdiction of United States District Courts in the various states are concerned, and since this provision specifically enumerates the type of cases to which the Federal judicial power shall extend, such power extends only to such cases and none other. While this provision states that the judicial power shall extend to controversies between citizens of different states, it does not provide that the judicial power shall extend to controversies between citizens of a state and citizens of a territory. In the absence of such constitutional grant of power, Congress acted in excess of its authority in attempting to confer jurisdiction on the District Courts in the various states in cases between citizens of a state and citizens of a territory.

In attempting to meet this situation, Appellant first argues that the phrase "between citizens of different states" should be construed to mean between citizens of a state and citizens of a territory." However, the provision is clear and un-ambiguous, and leaves no room for the construction urged by Appellant. The Constitution throughout differentiates between states and territories. The control of Congress over the territories is granted by separate and specific provisions of the Constitution. The Federal Courts have uniformly recognized the distinction be-

tween states and territories, as appears from the decisions later set out in this brief.

Appellant, evidently recognizing the weakness of his position, further urges that Article IV, Section 3, Sub-section 2, of the Constitution grants Congress the power to confer jurisdiction on the District Courts in cases of the type under consideration. This provision reads as follows:

“The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;”

this provision clearly relates only to “the territory or other property belonging to the United States,” and does not pertain to the states or the District Courts in the states. Whatever may be the powers granted thereunder to Congress over the territories, the provision does not purport to be a general grant of power to legislate on all matters pertaining to the states. This is particularly true in regard to a matter where the Constitution has specifically enumerated the powers granted, as in Article III, Section 2, Sub-section 1. If the general provisions of the Constitution were not limited by the specific provisions thereof, the specific provisions would be meaningless, and just so much surplusage. Further, it is elementary that all powers not granted to the United States by the Constitution are reserved to the States. The Tenth Amendment to the Constitution expressly provides:

“Rights reserved to states or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are



reserved to the states respectively, or to the people.”

The United States Supreme Court has always strictly construed constitutional provisions and judiciary acts relating to diversity jurisdiction. In the case of *City of Indianapolis vs. Chase National Bank*, 314 U.S. 63, 62 S. Ct. 15, 86 L. Ed. 47, that court said:

“Though variously expressed in the decisions, the governing principles are clear. To sustain diversity jurisdiction there must exist an ‘actual’,” *Helm v. Zarecor*, 222 U.S. 32, 36, S.Ct. 10, 11, 56 L.Ed. 77, ‘substantial’, *Niles-Bement-Pond Co., v. Iron Moulders’ Union*, 254 U.S. 77, 81, 41 S.Ct. 39, 41, 65 L.Ed. 145, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L.Ed. 435. \* \* \* \* \*

These requirements, however technical seeming, must be viewed in the perspective of the constitutional limitations upon the judicial power of the federal courts, and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts. See *Madisonville Traction Company v. St. Bernard Mining Company*, 196 U.S. 239, 255, 25 S.Ct. 251, 257, 49 L.Ed. 462 and *Ex parte Schollenberger*, 96 U.S. 369, 377, 24 L.Ed. 853. The dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the over-whelming burden of “business that intrinsically belongs to the state courts” in order to keep them free for their distinctive federal

business. See *Friendly*, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 510; *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108, 109, 61 S.Ct. 868, 85 L.Ed. 1214; *Healy v. Ratta*, 292 U.S. 263, 270, 54 S.Ct. 700, 703, 78 L.Ed. 1248. 'The policy of the statute (conferring diversity jurisdiction upon the district courts) calls for its strict construction. The power reserved to the states, under the Constitution (Amendment 10), to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution (Article 3). \* \* \* Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' *Healy v. Ratta*, *supra*, 292 U.S. at page 270, 54 S.Ct. at page 703, 78 L.Ed. 1248.

Since the early decision of Chief Justice Marshall in *Hepburn and Dundas v. Ellzey*, 2 Cr. 445, 6 U.S. 445, 2 L.Ed. 332, the United States Supreme Court has consistently held that a citizen of a territory is not a citizen of a state within the meaning of Article III, Section 2, of the Constitution. While the Supreme Court has not as yet passed directly on the question of the constitutionality of the 1940 amendment to Section 24 (1) of the Judicial Code (28 U.S.C. Section 41(1) the question has been presented before other federal courts, and the majority of these have held the 1940 amendment unconstitutional. These decisions are as follows:

*Central States Cooperatives v. Watson Bros. Transportation Co.*, 165 F. 2d 392 (CCA7);

National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co., Inc., of Virginia, 165 F. 2d 531, (CCA4);

Behlert v. James Foundation of N.Y., 60 F. Supp. 706 (S.D., N.Y.);

McGarry v. City of Bethelhem, 45 F. Supp. 385, (E.D., Pa.);

Ostrow v. Samuel Brilliant Co., 66 F. Supp. 593 (D.C., Mass.);

Wilson v. Guggenheim, 70 F. Supp. 417 (E.D.S. Car.).

The only decisions found to the contrary are the following district court cases:

Winkler v. Daniels, 43 F. Supp. 265 (E.D. Va.);

Glaeser v. Acacia Mutual Life Association, 55 F. Supp. 925 (N.D., Calif);

Duze v. Woolley, 72 F. Supp. 422 (D. Hawaii).

The two cases from the Fourth and Seventh Circuit Courts of Appeal above cited give an excellent review of the decisions of the United States Supreme Court bearing on the question here presented. We believe that it is clear therefrom that the power of Congress to confer jurisdiction on the District Courts in the various states is restricted to the cases enumerated in Article III, Section 2, of the Constitution, and that the Act of Congress of April 20, 1940, exceeds that power and is unconstitutional.

## POINT OF LAW NUMBER II.

A party to a contract with a corporation providing that he is to be paid as commissions a percentage of the net profits on sales made by the corporation, cannot maintain an action against

the officers of the corporation, who are not parties to the contract, merely because the corporation refuses to pay such commissions and the officers have or will divert the net profits of the corporation to themselves, where such party has not first exhausted his remedies against the corporation and the corporation is not insolvent.

Aside from the jurisdictional questions involved, the complaint sued on in the action fails to state a cause of action as against the defendants, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, and the District Court's order dismissing the action as to them was proper. The theory of plaintiff's complaint is that these last named defendants, while not parties to the contract sued on, are officers of the defendant corporation, General Commodities Corporation, Limited, and have diverted a portion of the net profits of that corporation to themselves, and in the future will divert all of the net profits of said corporation to themselves, and plaintiff, by reason thereof, will be unable to collect his commissions due him on sales made by said corporation. Plaintiff simply assumes that he has a vested interest or ownership in the net profits of said corporation, whereas the facts alleged show him to be a mere contract creditor. It is not alleged that the defendant corporation is insolvent, but on the contrary it appears from the allegations of the complaint that said corporation has in the past, and will in the future make immense profits. The allegations that a portion of the net profits of the corporation have been diverted to the officers, and that all the net profits will be diverted to them in the future, indicates that the corporation is presently solvent, and that the

plaintiff will suffer no damage until some time in the future. Unless the corporation is insolvent, the plaintiff has no interest in the assets of the corporation, whether net profits or otherwise, and the officers of the corporation owe him no duty in regard thereto. It is well settled that before a mere creditor can take action against the officers or stockholders of a corporation, the creditor must first establish his claim and exhaust his remedies against the corporation itself, and must further show that the corporation is insolvent. The following cases fully sustain this proposition:

Hollins v. Brierfield Coal & Iron Co., 150 U.S. 371, 14 Sup. Ct. 127, 37 L.Ed. 1113;

McDonald v. Williams, 174 U.S. 397, 19 S.Ct. 743, 43 L.Ed. 1022;

New Hampshire Sav. Bank v. Richey, 121 Fed. 956 (8th Ct.);

Bates v. Brooks, 270 N.W. 867, 222 Iowa 1128.

This last case gives an exhaustive discussion of the state and federal decisions bearing on this question. We believe that it is clear that plaintiff's complaint fails to state any cause of action as against the defendants, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana.

## CONCLUSION

It is respectfully submitted that the Act of Congress of April 20, 1940, amending Section 24 (1) of the Judicial Code, is unconstitutional, and that the District Court was without jurisdiction of the action as against the defendants, General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai

and Thelma M. Akana, and the action was properly dismissed as to them; Further that the complaint fails to state a cause of action against the defendants, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, and the action was also properly dismissed as to them for that reason; That the order of the District Court appealed from should be affirmed, and said appeal dismissed.

Respectfully submitted,

RAWLINS, DAVIS, CHRISTY & KLEINMAN,

By Geoff Rawlins

By William G. Christy

Attorneys for Appellees.

**No. 12068**

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IN THE  
**United States**  
**Court of Appeals**  
**For the Ninth Circuit**

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FRANK M. SIEGMUND,

Appellant,

vs.

GENERAL COMMODITIES CORPORATION,  
LIMITED, WM. H. HEEN, ERNEST K. KAI  
and THELMA M. AKANA,

Appellees.

---

Appeal from the District Court of the United States  
for the District of Arizona (Ling, J.)

---

APPELLANTS REPLY BRIEF

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IN THE  
United States  
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FRANK M. SIEGMUND,

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vs.

GENERAL COMMODITIES CORPORATION,  
LIMITED, WM. H. HEEN, ERNEST K. KAI  
and THELMA M. AKANA,

Appellees.

---

Appeal from the District Court of the United States  
for the District of Arizona (Ling, J.)

---

APPELLANTS REPLY BRIEF

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RESPONSE TO MOTION TO DISMISS  
APPEAL

The appellees have filed their motion to dismiss the appeal of the appellant, Frank M. Siegmund, basing their motion on two grounds, the first being that the United States Court of Appeals is without jurisdiction to entertain this appeal for the reason that the order appealed from is not a final order and there-

fore is not an appealable order. They argue that the action as to all defendants arose out of the same subject matter and that all defendants were sought to be held jointly liable, and that while the action was dismissed against the appellants on jurisdictional grounds, it remains standing in the District Court as to the defendants W. T. Davis, The Black Corporation and the White Corporation.

The contention may be disposed of insofar as the defendants The Black Corporation and the White Corporation are concerned at the outset. The record discloses that no process was served upon said defendant corporations (R. 17 a-b) and in fact the complaint (R. 9) alleges that the plaintiff did not know whether such corporations were in existence. The right to appeal is not affected nor denied by the absence of a decree as to parties who were named in the action but not served with process.

*Bradshaw v. Miners' Bank of Joplin*, 81 Fed. 902, 26 C.C.A. 673;

4 Corpus Juris Secundum 201;

2 American Jurisprudence 866.

As to the action remaining pending against the defendant Davis, it is established that where dismissal of an appeal would work a hardship or injustice upon the appellant, the appeal will be allowed despite the fact that the case remains undecided in the lower court against other parties to the action regardless of how joint or several their interests may be and regardless of the effect the appeal may have upon the issues pending below. This rule as to cases of hardship or injustice supersedes all rules as to appeals against some defendants while the action remains pending below as to others.

As stated in *Attorney General v. Pomeroy*, — Utah —, 73 P. (2d) 1277, 114 A.L.R. 726:

“That important policy of law that cases cannot be appealed piecemeal is subject to a still more paramount principle, and that is that injustice and hardship must be avoided whenever possible.”

See also: Annotation 80 A.L.R. 1192;

Annotation 114 A.L.R. 760;

4 Corpus Juris Secundum 199-201;

2 American Jurisprudence 866.

There appears no doubt that a dismissal of this appeal would work a great hardship and injustice upon the appellant and would in fact place him in an impossible situation. The dismissal by the District Court as to the appellees was upon a single jurisdictional ground involving the constitutionality of the diversity of citizenship statute and did not treat the merits of the action. Had an appeal not been taken at that time the time for taking appeal would have passed before further action in the District Court and the appellant might well have found himself without further remedy in either that Court or this Appellate Court as against the appellees. Even if appeal were allowed against these appellees after disposition of the case against Davis in the trial court, an extremely doubtful hypothesis, two exceedingly expensive trials would be required in the trial court involving substantial duplication of evidence. Even though the defendant Davis was retained before the District Court, the nature of the case as disclosed by the complaint (R. 2-16) is such that it would be virtually impossible to procure the necessary evidence and establish a cause of action

against him in the absence of the appellees from the case. Thus, for all practical purposes, the case remaining below should be treated as finally disposed of as to the defendant Davis as well as to the appellees, and a dismissal of this appeal would have the effect of depriving the appellant of relief against any of the parties to the action, an undeniable hardship and injustice. The appellant had no recourse whatever except pursuing this appeal. The foregoing elements of law and fact existed with substantial similarity in *Attorney General v. Pomeroy*, *supra*, and were there held to constitute such hardship and injustice as to justify the appeal.

The rule urged by appellees that an appeal should be dismissed as not founded upon a final order where some parties to the action remain before the trial court is not applicable where the issues or causes of action against the dismissed parties and the remaining parties are severable and not interdependent.

*United States v. River Rouge Improvement Co.*,  
269 U. S. 411, 46 S. Ct. 144, 70 L. Ed. 339;

*Hill v. Chicago & E. R. Co.*, 140 U. S. 52, 11 S. Ct.  
690, 35 L. Ed. 331;

Annotation 80 A. L. R. 1192;

Annotation 114 A. L. R. 761;

4 Corpus Juris Secundum 201;

2 American Jurisprudence 866.

The complaint in this action (R. 2-16) sets forth two separate causes of action, the first against the defendant General Commodities Corporation, Limited, for breach of a contract therein set forth, and the second against said corporation, an appellee

herein, the appellees Heen, Kai and Akana and the defendant Davis for engaging in a conspiracy and acts pursuant thereto to divest said corporation of certain assets and cause such assets to be distributed to themselves for the purpose of defeating a recovery by the plaintiff. These separate causes of action are severable and independent in that a recovery against the corporation on the first count is in no way dependent upon the result of the second. The fact that the action remains undisposed of against the defendant Davis does not preclude finality of the order of dismissal against the corporation on the first cause of action, nor, in fact, does it preclude finality of the order as to the other appellees as several conspirators.

*Curtis v. Connly*, 264 Fed. 160, affirming 259 Fed. 961, Affirmed, 257 U. S. 960, 42 S. Ct. 100, 66 L. Ed. 222.

As their ground number II for their Motion to Dismiss this appeal, the appellees contend that no question of error has been presented to this Appellate Court for the alleged reason of failure by the appellant in his brief to observe rule 20, subdivision 2 (d) of the Rules of this Court which requires that a specification of errors relied upon shall be set forth separately and particularly, individually numbered.

In support of this contention, the appellees in their brief cite five decisions of this Court which they advance as authority for the proposition that when alleged error is not specified in appellant's brief as required by the rule, such error will not be considered and that the appeal should therefore be dismissed. An examination of the cases cited by appellees reveals that all are extreme cases wherein it was virtually impossible to determine the nature of the points

urged as error, either by a failure to set forth the error urged, or by reason of such deficiency in the record and in the brief that rulings or matters of evidence contended to constitute error were not presented to the Court. In most of the cases cited, the Court proceeded to examine and determine the existence or non-existence of error despite the failure to assign such error in the manner prescribed by the Rules of this Court.

In the instant case, no doubt whatever can exist as to the specific error assigned by the appellant. In the transcript of record (R. 71-72) the appellant stated as a point to be relied on,

“The District Court erred in concluding that the Act of Congress passed in 1940, 28 U. S. C. A. 41, amending Section 24, subdivision 1, of the Judicial Code, is unconstitutional.”

It was also therein stated that the Court erred in dismissing the action against the appellees. Error in dismissing the action against the appellees was urged on page 23 of appellant's brief and as stated on page 1 of appellant's brief only one ground for dismissing the action as against the appellees was relied upon by the District Court, that being a finding that the Act of Congress passed in 1940, 28 U. S. C. A. 41, amending Section 24, Subsection 1 of the judicial code is unconstitutional. The facts stated on page 2 of appellant's brief set forth that the appellant is a citizen of the State of Arizona, and that the appellees are all citizens of the Territory of Hawaii. The statute and the constitutional provisions involved are set forth in appellant's brief and the question of the constitutionality of the statute above cited is the only point discussed in the argument set forth in



appellant's brief. The error thus assigned is unmistakable.

The appellees' second ground for their Motion to Dismiss this appeal is therefor untenable.

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## RESPONSE TO APPELLEES POINT OF LAW NUMBER 1

In their point of law number 1, appellees urge the unconstitutionality of the Act of Congress of April 20, 1940, amending Section 41 (1) of Title 28 United States Code, specifically authorizing actions in the District Courts of the United States between citizens of a state and citizens of a territory. In their argument appellees cite cases heretofore cited by the appellant in his brief, which said cases were discussed therein by the appellant. We deem it unnecessary to burden the record with a repetition of the statements and arguments contained in appellant's brief.

The appellees cited and quoted from but one case not discussed in the appellant's opening brief, *City of Indianapolis vs. Chase National Bank*, 314 U. S. 63, 62 S. Ct. 15, 86 L. Ed. 47. An examination of that case reveals that it involved a factual situation and a point of law entirely foreign to the facts and point here at issue. That action was between citizens of different states of the United States and it appeared that a party named as a defendant was, from an examination of the true significance of the facts, aligned on the same side of the controversy as the plaintiff, the court invoking the ruling that in determining the existence of diversity of citizenship, the parties must be construed as plaintiffs or defendants

according to their actual interest in the controversy regardless of how they may have designated themselves. The case did not involve diversity of citizenship between citizens of a state and of a territory, and thus did not treat the full judicial power of the United States as contained in the Constitution. No question of the propriety of denying to any segment of the citizenry of the United States the use of Federal Courts granted to other citizens or to foreigners was considered. The arguments set forth in appellant's brief on the point involved have not been refuted.

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## RESPONSE TO APPELLEES' POINT OF LAW NUMBER II

The appellees advance a point of law designated in their brief as their point of law number II, to the effect that the appellant cannot maintain an action against the officers and stockholders of a corporation who have wilfully caused its assets to be diverted to themselves pursuant to a conspiracy to divest the corporation of its assets for the purpose of defeating a recovery by the appellant, unless he first exhausts his remedies against the corporation and unless the corporation be insolvent.

This precise point was urged in the District Court in the form of a Motion and an Amended Motion of the defendants Davis, Heen, Kai and Akana to Quash Return of Service of Summons and Dismiss Action (R. 56) and was set out with particularity in the memorandum accompanying said Motion and referred to therein. That grounds of the motion was by necessary implication overruled by the District Court by its Order of Dismissal of July 3, 1948 (R. 68) which dismissed the action as against the appel-

lees on the sole ground of a finding that the Act of Congress amending Section 24, Subdivision 1 of the Judicial Code was unconstitutional. That the ground now urged by the appellees was overruled in the District Court further appears from the fact that the defendant Davis was retained in the case below although his status therein was identical with that of the appellees as to the point of the conspiracy and acts pursuant thereto. The point now urged by the appellees goes to the merits of the cause of action and is substantive rather than jurisdictional.

The point having been urged by the appellees in the District Court and there overruled, they cannot now raise it here without having taken a cross appeal or writ of error from the District Court's overruling thereof. This rule is well stated in 3 American Jurisprudence 362 (Appeal and Error, Section 821) as follows:

“An appeal brings up for review only that which was decided adversely to the appellant. The part of a judgment favorable to him is not reviewable if the respondents do not appeal.”

See also: *Loudon v. Taxing District*, 104 U. S. 771, 26 L. Ed. 923;  
3 American Jurisprudence 403 et. seq.,  
(Appeal and Error, Section 866).

Since the point urged as appellees' number II is not properly before this Appellate Court, appellant respectfully moves and urges that the same be stricken.

Even if the point were properly before the Court on appeal, it is groundless. The complaint shows by

necessary implication that the conspiracy and acts pursuant thereto complained of have made and will make the appellee corporation insolvent and unable to make payment of its obligation to the appellant. This is alleged to be the express purpose of the appellees' actions in that regard. The complaint alleges that the non-corporate defendants are the sole officers and stockholders of the defendant General Commodities Corporation, Limited and that they alone control the corporation which is in effect their alter ego, and further, that they formed the corporation for a single purpose and will cause it to be dissolved upon the accomplishment of that brief purpose. It is therein alleged that the appellants are engaging and have engaged in knowing and willful acts for the express purpose of defrauding the appellant. Under such circumstances it is not necessary for the appellant to first exhaust all remedies against the corporation, itself a conspirator, before looking to the other appellees.

*Bates v. Brooks*, 270 N. W. 867 (Iowa);

*Meredith v. Johns*, 1 H. & M. (11 Va.) 585;

*Mott v. Danforth*, 6 Watts (Pa.) 304, 31 Am. Dec. 468;

*Merchants & Manufacturers Nat. Bank of Pittsburg v. Tinker*, 158 Pa. 17, 21 A. 838.

## CONCLUSION

For the foregoing reasons it is submitted:

1. That this appeal should not be dismissed on either of the grounds urged by the appellees.
2. That the appellees have not established their claim of unconstitutionality of the 1940 amendment

to Section 41 (1) of Title 28, United States Code.

3. That appellees' point of law number II is not properly before this Appellate Court and should be stricken from this appeal; that even if that point were properly before this Court, it is not well taken.

It is therefore earnestly urged that the District Court erred in finding the 1940 amendment to Section 41 (1) of Title 28, United States Code unconstitutional and that the Court's order should be reversed and the dismissal against the appellees set aside.

Respectfully submitted,

JAMES L. DeSOUZA

JOHN F. SULLIVAN

*Attorneys for Appellant.*



No. 12069

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United States  
Court of Appeals  
for the Ninth Circuit

---

F. K. DENT,

Appellant,

VS.

ALASKA PLACER COMPANY,

Appellee.

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Transcript of Record

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Appeal from the District Court for the Territory of Alaska,  
Second Division

**FILED**  
JAN 24 1949





No. 12069

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United States  
Court of Appeals  
for the Ninth Circuit

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F. K. DENT,

Appellant,

vs.

ALASKA PLACER COMPANY,

Appellee.

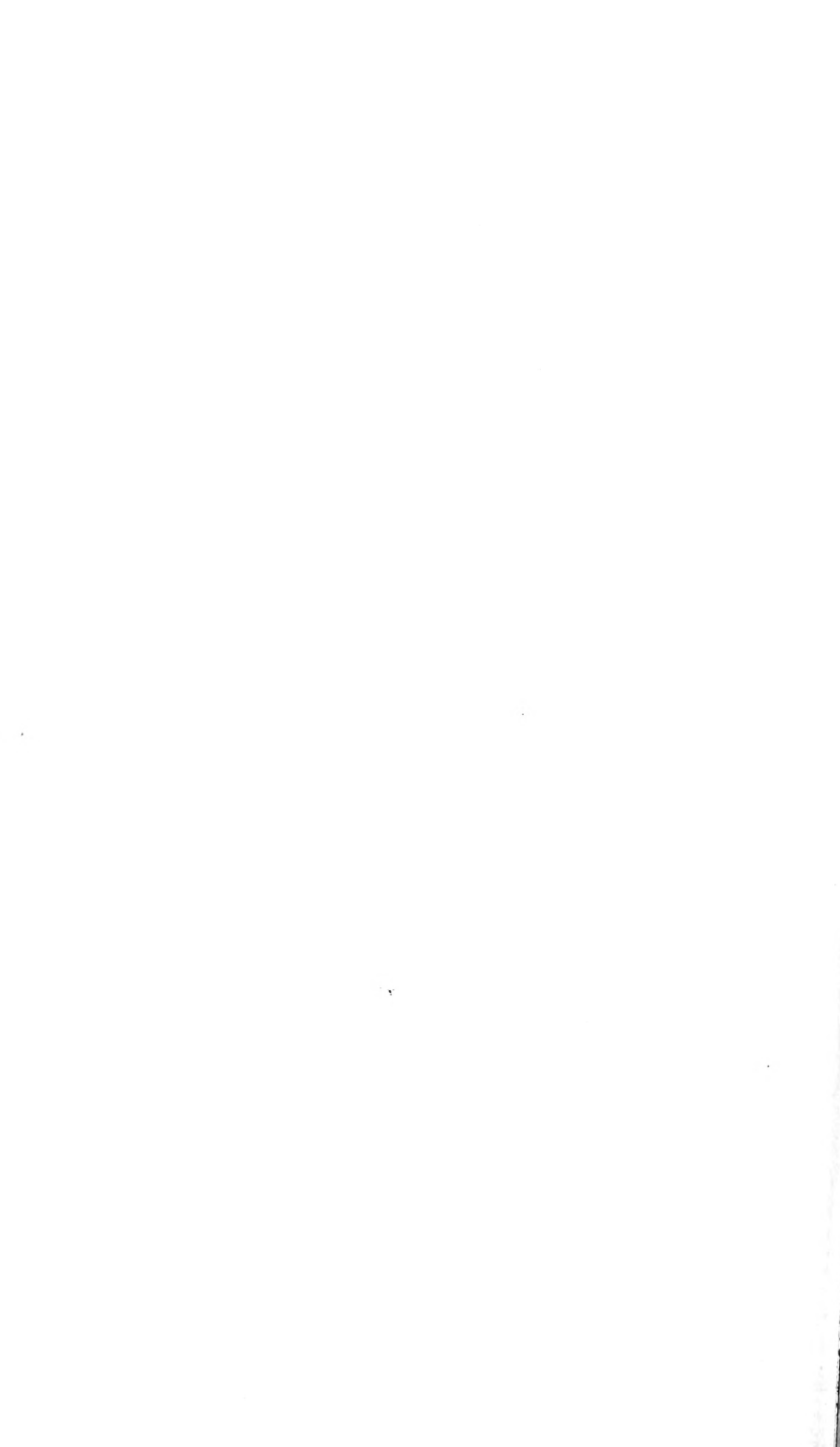
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Transcript of Record

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Appeal from the District Court for the Territory of Alaska,  
Second Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

COLLINS and CLASBY,  
CHARLES J. CLASBY,

P. O. Box 1368,  
Fairbanks, Alaska,

Attorneys for Plaintiff.

C. C. TANNER,

P. O. Box 27,  
Nome, Alaska.

In the District Court for the Territory of Alaska,  
Second Division.

No. 3781

F. K. DENT,

Plaintiff,

vs.

ALASKA PLACER COMPANY,  
a Corporation,

Defendant.

### COMPLAINT

Comes Now plaintiff above-named and for his cause of action against the defendant above-named, alleges as follows:

#### I.

That the defendant is a domestic corporation, organized and existing under the laws of the Territory of Alaska, with its principal office in the Town of Nome, Alaska.

#### II.

That the plaintiff is now, and for more than six years last past has been, the owner in fee as to all persons, save and except the United States of America, and has been and is now entitled to the sole and exclusive possession of those certain placer mining claims known and described as follows:

(a) The Glass Fraction placer mining claim, containing twenty (20) acres, or less, situate on and across the Niukluk River in the Cape Nome Mining and Recording Precinct, Second Division, Territory of Alaska, just below the Town of Council,



and adjoining the up-stream end of the Magnium Bonus Association placer mining claim, bounded and described as follows:

Commencing at the Initial Stake, thence 850 feet up-stream, thence 600 feet across stream, thence 900 feet [1 \*] downstream, thence 650 feet across stream to place of beginning.

(b) The Magnium Bonus Association placer mining claim, containing forty (40) acres, or less, situate on and across the Niukluk River in the Cape Nome Mining and Recording Precinct, Second Division, Territory of Alaska, just below the confluence of Melsing Creek with said River, bounded as described as follows:

Commencing at the Initial Stake set about 800 feet below the confluence of Melsing Creek and Niukluk River, thence downstream on the Niukluk River 1320 feet to a post; thence across the river 1320 feet to a post; thence upstream 1320 feet to a post; thence across said river 1320 feet to the place of beginning.

(c) The Rainbow Association placer mining claim containing forty (40) acres, or less, situate on and across the Niukluk River in the Cape Nome Mining and Recording Precinct, Second Division, Territory of Alaska, just below the confluence of Melsing Creek with said River, bounded and described as follows:

Commencing at the initial stake set at the downstream Left Limit corner of the Magnium Bonus Association placer mining claim, thence

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

downstream 1320 feet to a post; thence across the River valley 1320 feet to a post; thence upstream 1320 feet to a post; thence across the valley 1320 feet to the initial stake.

(d) The H & H Association placer mining claim containing forty (40) acres, or less, situate on and across the Niukluk River in the Cape Nome Mining and Recording Precinct, Second Division, Territory of Alaska, below the confluence of Melsing Creek with said River, bounded and described as follows:

Commencing at the initial stake set at the Left Limit downstream corner of the Rainbow Association placer mining claim, thence downstream 1320 feet to a post; thence across the stream 1320 feet to a post; thence upstream 1320 feet to a post; thence across stream 1320 feet to the initial stake.

(e) The S & S Association placer mining claim containing forty (40) acres, or less, situate on and across the Niukluk River in the Cape Nome Mining and Recording Precinct, Second Division, Territory of Alaska, below the confluence of Melsing Creek with said River, [2] bounded and described as follows:

Commencing at the initial stake set at the Left Limit downstream corner of the H & H Association placer mining claim, thence downstream 1320 feet to a post; thence across the stream 1320 feet to a post, thence upstream 1320 feet to a post, thence across the stream 1320 feet to the initial stake.

(f) The Surprise Association placer mining claim, containing forty (40) acres, or less, situate on the Right Limit of the Niukluk River in the Cape Nome Mining and Recording Precinct, Second Division, Territory of Alaska, about one mile below the confluence of Melsing Creek and said River, bounded and described as follows:

Commencing with the initial stake set at Corner No. 3, L and A Claim, U. S. Mineral Survey No. 1152, (being the northwest corner of this claim); thence in an easterly direction 500 feet to a corner, not set, in the Niukluk River; thence in a southerly direction (downstream), 3480 feet to a corner, not set, in the Niukluk River; thence in a westerly direction 500 feet to a post; thence in a northerly direction (upstream) 3480 feet to the initial stake, specifically including the right to the exclusive possession of all of the bed of the Niukluk River within the end lines of said claims for the purpose of prospecting and mining the same.

### III.

That said defendants, on or about the 15th day of September, 1947, ousted and ejected plaintiff from said placer mining claims and now do wrongfully and unlawfully withhold the same, and the whole thereof, from plaintiff to its damage as hereinafter stated.

### IV.

That said placer claims above described are chiefly valuable for the placer gold and other min-

erals therein contained, and that, during the balance of the open mining season in 1947 and during the mining season of 1948 until the date of this Complaint said defendants, without right or authority, unlawfully entered thereon and excavated the same and conducted mining and dredging operations thereon, and extracted and removed therefrom placer gold and other minerals of the value of One Hundred Twenty Thousand (\$120,000.00) Dollars, and thereby depleted the estate of plaintiff in the premises to the value of [3] One Hundred Twenty Thousand (\$120,000.00) Dollars, and plaintiff thereby sustained damages in the amount of One Hundred Twenty Thousand (\$120,000.00) Dollars. That the removal of minerals, depletion of said estate and consequent damage to plaintiff **will** be continued by defendant, as plaintiff is informed and believes.

#### V.

That the acts of defendant, and each of them in withholding from plaintiff the said placer mining claims and in depleting the estate of this plaintiff therein were committed maliciously and in bad faith and in wanton disregard of the rights of this plaintiff in and to said placer mining claims, and the whole thereof, and said plaintiff should be awarded such sum as punitive damages as the said Court may allow.

#### VI.

That plaintiff herein has been obligated to and has employed the services of an attorney for the purpose of prosecuting this action, the reasonable value of whose services in the sum of Fifteen

Thousand (\$15,000.00) Dollars, as near as can be estimated upon the signing of this complaint.

Wherefore plaintiff prays for the entry herein of judgment as follows:

(a) To the effect that plaintiff was at all times hereinabove mentioned and now is, the owner and entitled to the sole and exclusive possession of said Glass Fraction, Magnium Bonus Association, Rainbow Association, H and H Association, S and S Association and Surprise Association placer mining claims hereinabove described as being wrongfully withheld by said defendant, and that his estate therein is fee as to uplands and the exclusive possession for prospecting and mining as to the bed of the Niukluk River as against all persons save and except the United States of America; [4]

(b) That the plaintiff is entitled to recover from the defendant the sum of One Hundred Twenty Thousand (\$120,000.00) Dollars, damages for the wrongful withholding and actual depletion of the value of said mining claims hereinabove described, with such additional damages thereto as shall occur after the date of this complaint, and for such further sum as may be by the Court allowed as punitive damages;

(c) And for the recovery of his costs and disbursements in this action incurred, including a reasonable attorney's fee to be set by the Court.

COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for Plaintiff.

(Duly Verified.)

[Endorsed]: Filed Aug. 12, 1948.

[5]

[Title of District Court and Cause.]

APPLICATION FOR INJUNCTION  
PENDENTE LITE

Comes now plaintiff above named and respectfully moves the Court for the entry herein of an order requiring defendant to appear before the Court at a time and place certain, and then and there show cause, if any it has, why it should not be enjoined during the pendency of this action from mining and extracting minerals from the mining claim of plaintiff described in the Complaint on file herein; and that upon such hearing that defendant be so enjoined.

This application is based upon the verified complaint of plaintiff now on file in this cause and his affidavit hereto attached.

COLLINS & CLASBY,  
By /s/ CHAS. J. CLASBY,  
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 12, 1948.

[6]

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[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF INJUNCTION  
PENDENTE LITE

F. K. Dent, being first duly sworn, on his oath deposes and says:

That I am the plaintiff in the above entitled action and make this affidavit in support of my motion for the entry herein of an injunction, pendente lite.

That all of the mining claims described in plaintiff's Complaint were staked in November of 1933, excepting the Glass Fraction in March of 1936 and the Surprise Association in May of 1938. That since location, these claims have been held openly, notoriously and adversely to all, except the United States, by plaintiff and his predecessors, including the predecessors in interest of the properties of defendant, they being also the stockholders of defendant, who at one time held these identical claims under lease.

That each of the mining claims described in the Complaint contain valuable mineral deposits. That the lands, and river bed, embraced within the boundaries of these claims have been held by divers persons under various locations thereof since the early days of mining in the Nuikluk River, and were dealt with, and now are dealt with, as conferring on the owner, or locator valuable possessory rights. [7]

That on or about the 15th day of September, 1947, without right or authority, defendant, its agents and employees, entered upon said mining claims, over and against written objection by plaintiff, with a dredge. That defendant thereafter, during the open mining season of 1947, and during the mining season of 1948 to date, dredged and mined the grounds of said mining claims with one dredge swing through the Magnum Bonus Association, Rainbow Association, H & H Association, S & S Association, and into the Surprise Association, and extracted gold therefrom in great quantity, all

along the heavy pay streak, well known to the officers and stockholders of defendants through drill logs of these claims that came into their possession when they were lessees thereof. That the drill reports show large quantities of the ground mined by defendant to have contained in excess of \$2.00 per yard. Affiant is informed and believes, and therefore states, that defendant has recovered in excess of \$1500.00 a day in gold extracted from said claims, and that it mined said claims approximately twenty days in 1947 and has mined said claims approximately sixty days in the year 1948.

That plaintiff has filed in this cause an ejectment action, seeking recovery of said mining properties and damages for their detention by defendant. That the defendant is continuing, and unless restrained, will continue to mine these and other properties of plaintiff, and that defendant has and will continue to gut said properties by mining the very heart thereof, wasting the economic dredging limits thereof and rendering the balance of minable limits of said claims severely depreciated, damaged and unminable by reason thereof. That the estate of plaintiff will be irreparably damaged if defendants be not restrained from further trespass and mining thereof.

That the defendant received assets, valued at \$44,593.14 as of December 31, 1944, as shown by its financial statement on file in the office of the Clerk of this Court, for which it issued \$50,000.00 in par [8] value of its capital stock. That as of December 31, 1944, defendant was indebted in the



sum of \$20,439.62. That on December 31, 1947, according to its financial statement on file with the Clerk of this Court, and after it had extracted in excess of \$30,000.00 in gold from the claims of plaintiff, defendant only had assets of \$49,221.42 against which it acknowledged indebtedness of \$56,613.25. That defendant, by its financial statement, was insolvent on December 31, 1947; and affiant believes that this corporation is so closely held and owned by its directors and officers, and so manipulated as to salaries to stockholders and expenses of operations that it is now and will continue to be insolvent, or so nearly so, as to render any recovery of damages in this cause by plaintiff unrecoverable and ineffectual as any remedy for the loss to plaintiff. Affiant believes, and the facts above stated indicate, that the value of the gold extracted from the claims of plaintiff by defendant is, and will continue to be, diverted into the personal possession of its officers and stockholders and beyond the reach of plaintiff by judgment for damages, thus rendering his remedy at law ineffectual.

Further affiant sayeth not.

/s/ F. K. DENT.

Subscribed and Sworn to before me this 12th day of August, 1948.

(Seal) /s/ NORVIN W. LEWIS,  
Clerk of the U. S. District Court, Second Division,  
Territory of Alaska.

[Title of District Court and Cause.]

### ORDER TO SHOW CAUSE

This matter having come on for hearing this day upon plaintiff's application for an injunction pendente lite on file herein, and the Court having read said application, the affidavit in support thereof, and the Complaint on file herein, and finding therefrom that plaintiff is entitled to the relief therein demanded, and that such relief consists in recovering the possession of real property of which defendant is in possession and is committing acts which, if permitted during the pendency of this action, would cause injury to plaintiff,

Now Therefore, It Is Hereby Ordered that the defendant appear before the above entitled Court in its courtroom on the first floor of the Federal Building in the Town of Nome, Alaska, on the 25th day of August, 1948, at the hour of 2 o'clock in the afternoon of said day, and then and there show cause, if any it have, why this Court should not, pending final determination of this cause, enter in this proceeding an order restraining and enjoining defendant from mining and extracting minerals from those placer mining claims situate on the Nuikluk River in the Cape Nome Mining and Recording Precinct, Second Division, Territory of Alaska, known as the Glass Fraction, Magnum Bonus Association, Rainbow Association, H & H Association, S & S Association and Surprise Association, according to the locations [10] thereof, they being located successively as named, down-

stream on said Nuikluk River, commencing with its confluence with Melsing Creek, a tributary of said Nuikluk River.

It Is Further Ordered that a certified copy of this Order and of the Application for Injunction Pendente Lite and the Affidavit of F. K. Dent in support thereof be forthwith served upon the defendant.

Done at Nome, Alaska, this 12th day of August, 1948.

/s/ JOSEPH W. KEHOE,  
District Judge.

[Endorsed]: Filed Aug. 12, 1948.

[11]

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[Title of District Court and Cause.]

### ANSWER

Comes now the defendant and in answer to plaintiff's complaint admits, denies and alleges as follows:

#### I.

In answer to Section I of plaintiff's complaint, defendant admits the allegations therein and affirmably alleges that said defendant has paid unto the Territory of Alaska its annual corporation tax last due and has complied with all Territorial Laws prerequisite to a defense of this action.

#### II.

In answer to Section II of plaintiff's complaint, defendant denies each and every allegation therein

contained except for the general location of the purported mining claims therein named, and as to this, defendant admits that said purported mining claims extend over, across and along the Niukluk River, beginning "just below the confluence of Melsing Creek with said river," in the Cape Nome Precinct, Second Division, Territory of Alaska.

### III.

Answering Section III of plaintiff's complaint, defendant denies each and every allegation therein contained.

### IV.

Answering Section IV of plaintiff's complaint, defendant admits that during the latter part of the open placer mining season of 1947 it floated its dredge over the navigable waters of the Niukluk River from a short distance above Melsing Creek to a point on patented mining claim L and A Bench, U.S.M.S. 1152, held by defendant under lease and which is located on the right limit of the Niukluk River, to a point about two-thirds of the distance between Melsing Creek and Bear Creek, and that during the open placer mining season of 1948 to date, it has conducted mining operations in the bed of the Niukluk River below the confluence of Melsing Creek with the said river and between points U.S.L.M. No. 1152, lat.  $64^{\circ} 53''$  N., long  $163^{\circ} 40''$  W. and a point downstream where Bear Creek enters into the said river, and that all such operations have been carried on and conducted in accordance with Federal law and United States

Government permission granted thereunder, all of which being more fully set forth and affirmably alleged hereinafter: That except as modified herein, defendant denies each and every allegation contained in Section IV of plaintiff's complaint. [12]

## V.

Answering Section V of plaintiff's complaint, defendant denies each and every allegation therein contained.

## VI.

Answering Section VI of plaintiff's complaint, defendant denies each and every allegation therein contained.

For a first, further and separate answer and defense to the complaint of plaintiff, defendant alleges:

A. That in Civil Action No. 3473, this Court, titled, "United States of America, plaintiff vs. Joseph E. Lucas, et al, defendants," a written judgment and decree was rendered the 29th day of September, 1941, and filed in this said Court and cause the 30th day of September, 1941, wherein (among other things) it was adjudged and decreed "that the United States of America is the holder of all right, title and interest in and to the bed of the Niukluk River below the line of ordinary high water from a point on said Niukluk River fifteen hundred (1500) feet upstream from its confluence with Melsing Creek downstream to its confluence with the Fish River, and to all the values therein: . . .": That a copy of said judgment is attached

hereto marked Exhibit 1 and made a part hereof.

B. That during the year 1947, a law known as Public Law 383—80th Congress, was passed by the Congress of the United States and approved by the President of the United States August 8, 1947, authorizing (among other things) the exploration and mining for gold and other precious metals in Alaska below the line of ordinary high water mark on non-tidal waters navigable in fact, subject, nevertheless, to certain conditions therein prescribed: That a copy of said law is hereto attached marked Exhibit 2 and forms a part hereof.

C. That in accordance with the said law and its provisions the United States, Department of the Army, Corps of Engineers, on the 21st day of October, 1947, issued unto the defendant herein a permit to dredge for gold in the Niukluk River just southeasterly of Council, Alaska: That a copy of said permit is hereunto attached marked Exhibit 3 and forms a part hereof.

D. That the United States, Department of Interior, Bureau of Land Management by and through Circular No. 1667, approved November 26, 1947, prescribed rules and regulations under which mining for gold and other precious metals in the beds and along the shores of navigable waters in Alaska may be pursued: A copy of such rules and regulations is hereunto attached marked Exhibit 4, and forms a part hereof.

E. That with reference to plaintiff's complaint the mining operations of defendant have been and now are being carried on exclusively in the bed of

the navigable waters of the Niukluk River and within the area declared navigable by this Court in Civil Action No. 3473; and in accordance with the law, permit, rules and regulations as hereinabove set forth.

For a second and further answer and defense to the complaint of plaintiff, defendant alleges:

1. That any and all purported rights of plaintiff as in his complaint alleged are founded upon purported mineral locations made upon the navigable waters of the Niukluk River; and these purported rights have been acquired by him with full knowledge of the navigability of the said river, and subsequently to the judgment and decree of this Court in Civil Action No. 3473, referred to herein under "A" of defendant's first affirmative defense.

For a third and further answer and defense to the complaint of plaintiff, defendant alleges:

1. That by deed dated March 17, 1946, and recorded in Vol. 222, Page 498, Cape Nome Precinct Recording Records, Clyde Glass and Violet Glass purported to transfer by warranty deed the following claims "located on the Niukluk River: to F. K. Dent:

Brown,  
Glass Fraction,  
Magnum,  
S & S,  
H & H,  
Surprise,  
Selassie,  
Glass Triangle,  
Leona.

That all mining claims named in plaintiff's complaint are included in this said deed. That Clyde Glass, one of the grantors, was a party defendant in Civil Action, this Court, No. 3473, referred to hereinbefore, and the judgment and decree rendered therein specifically states that he has no right, title or interest in or to the bed of the navigable waters of the Niukluk River.

### VII.

That a reasonable attorney's fee to be allowed defendant for the defense of this action is a sum not less than \$1,500.00.

Wherefore, defendant prays that plaintiff takes nothing by virtue of his action, that the action be dismissed with prejudice, and that defendant recover its cost which shall include a reasonable attorney's fee.

/s/ C. C. TANNER,  
**Attorney for Defendant,**



United States of America,  
Territory of Alaska—ss.

Ralph Lomen after being first duly sworn deposes and says:

I am the President and General Manager of the Alaska Placer Company, defendant herein: I have read the foregoing Answer to plaintiff's complaint and know the contents thereof; all things therein stated are true as I verily believe.

/s/ RALPH LOMEN.

Subscribed and Sworn to before me the 24th day of August, 1948.

(Seal) /s/ C. C. TANNER,

Notary Public in and for the Territory of Alaska,  
residing at Nome. My commission expires July  
18, 1950.

Copy received this 24th August, 1948.

CHAS. J. CLASBY,  
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 25, 1948.

[14]

## EXHIBIT No. 1

In the District Court of the United States for the  
Second Judicial Division of Alaska.

Civil No. 3473

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH E. LUCAS, EUGENE V. LUCAS and  
AUGUST HANOT, co-partners, doing business  
under the firm name and style of Alaska Placers  
Company, a limited partnership, NELS SWAN-  
BERG, SR., administrator of the estate of Emil  
C. Strom, deceased, sometimes known as Charles  
Strom, Clyde D. Glass and John L. Ost,  
Defendants.

## JUDGMENT

The above matter having come on regularly for trial before the Court on the 18th day of August, 1941; the plaintiff appearing by its attorney, Charles J. Clasby, United States Attorney; the defendant Nels Swanberg, Sr., as administrator of the Estate of Emil C. Strom, deceased, sometimes known as Charles Strom, appearing by his counsel, Leroy M. Sullivan; the defendants Joseph E. Lucas, Eugene V. Lucas and the Alaska Placers Company appearing by their counsel, Ira D. Orton; and the defendant Clyde D. Glass appearing by his counsel, O. D. Cochran; and the defendant John L. Ost failing to appear either in person or by counsel and the Court having heretofore caused to be

entered herein his default for want of answer or any appearance; and the evidence adduced by the parties having been heard, arguments by counsel considered and the Court being fully advised in the premises and having heretofore cause to be made and entered herein its Findings of Fact and Conclusions of Law, Now Therefore

It Is Hereby Ordered, Adjudged and Decreed that the defendants Alaska Placers Company, a limited partnership, Joseph E. Lucas and [15] Eugene V. Lucas, and their servants and agents, be and they are hereby barred from mining or removing in any manner, gold, precious minerals or things of value from the bed of the Nuikluk River below the line of ordinary high water from a point on the Nuikluk River fifteen hundred (1500) feet upstream from its confluence with Melsing Creek downstream to its confluence with the Fish River, which flows into Golofnin Bay off Norton Sound, Territory of Alaska, until such time as legal authority so to do is secured by said defendants from the sovereign owner of said herein described real property.

It Is Further Adjudged and Decreed that the United States of America is the holder of all right, title and interest in and to the bed of the Nuikluk River below the line of ordinary high water from a point on said Nuikluk River fifteen hundred (1500) feet upstream from its confluence with Melsing Creek downstream to its confluence with the Fish River, and to all the values therein; and that Nels Swanberg, Sr., as administrator of the Estate

of Emil C. Strom, deceased, sometimes known as Charles Strom, Clyde D. Glass and John L. Ost as riparian owners of mineral claims do not, by virtue thereof, acquire any right, title or interest in or to the soil or the values therein below the line of ordinary high water, it being specifically declared that the above portion of the Nuikluk River is a part of the navigable waters of the Territory of Alaska.

It Is Further Ordered that the plaintiff have and recover against the defendants its costs to be taxed by the Clerk of this Court, and have execution therefor; provided, however, that all costs incurred in connection with the issuance of the preliminary injunction herein shall be only taxed against the defendants Alaska Placers Company, Joseph E. Lucas and Eugene V. Lucas; and provided further that there shall be taxed as against John L. Ost only those costs incurred in service of process upon him and the entry of his default herein.

Done in open Court at Nome, Alaska, this 29th day of September, 1941.

/s/ J. H. S. MORISON,  
United States District Judge.

Copy received this 19th day of September, 1941.

/s/ IRA D. ORTON,  
Attorney for defendants Joseph E. Lucas, Eugene V. Lucas and Alaska Placers Co.

/s/ LEROY M. SULLIVAN,  
Attorney for Nels Swanberg, Sr., as administrator of the Estate of Emil C. Strom, deceased, sometimes known as Charles Strom.

/s/ O. D. COCHRAN,  
Attorney for defendant Clyde D. Glass.

[Endorsed]: Filed Sept. 30, 1948. [17]

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EXHIBIT No. 2

(Public Law 383—80th Congress)

(Chapter 514—1st Session)

(H. R. 174)

AN ACT

To amend section 26, title I, chapter 1, of the Act entitled “An Act making further provision for a civil government for Alaska, and for other purposes”, approved June 6, 1900 (31 Stat. 321), as amended by the Act of May 31, 1938 (52 Stat. 588).

Be it enacted by the Senate and House of Representatives of the United States of America in Con-

gress assembled, That section 26, title I, chapter 1, of the Act entitled "An Act making further provision for a civil government for Alaska, and for other purposes", approved June 6, 1900 (31 Stat. 321), as amended by the Act of May 31, 1938 (52 Stat. 588), is further amended to read as follows:

"Sec. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the Territory of Alaska: Provided, That, subject only to the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, and to the laws for the protection of fisheries, and subject also to such general rules and regulations as the Secretary of the Interior may prescribe for the preservation of order and the prevention of injury to the fisheries, all land below the line of ordinary high tide on tidal waters and all land below the line of ordinary high-water mark on non-tidal water navigable in fact, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: Provided Further, That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United

States; and no exclusive permit shall be granted by the Secretary of the Interior authorizing any person or persons, corporation, or company to excavate or mine under any of said waters, and if such exclusive permit has been granted it is hereby revoked and declared null and void. The rules and regulations prescribed by the Secretary of the Interior under this section shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation or impair the fisheries, and the reservation of a roadway sixty feet wide under the tenth section of the Act of May 14, 1898, entitled, 'An Act extending the homestead laws and providing for right-of-way for railroads in the District of Alaska, and for other purposes', shall not apply to mineral lands or town sites. No person shall acquire by virtue of this section any title to any land below the line of ordinary high tide or the line of ordinary high-water mark, as the case may be, of the waters described in this section. Any rights or privileges acquired hereunder with respect to mining operations in land title, to which is transferred to a future State upon its admission to the Union and which is situated within its boundaries, shall be terminable by such State, and the said mining operations shall be subject to the laws of such State."

Sec. 2. Nothing in this Act shall be deemed to affect or impair any valid claims, rights or privileges, including possessory claims under the first

proviso of section 8 of the Act of May 17, 1884 (23 Stat. 26), arising under any other provision of law.

Approved August 8, 1947. [18]

### EXHIBIT No. 3

#### Department of the Army

Note—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining State assent to the work authorized. It merely expressed the assent of the Federal Government so far as concerns the public rights of navigation. (See *Cummings v. Chicago*, 188 U. S., 410.)

#### PERMIT

United States Engineer Office.

North Pacific Division, Portland, Oregon.

October 21, 1947.

Alaska Placer Company,  
327 Colman Building,  
Seattle 4, Washington.

Gentlemen:

Referring to written request dated 22 August, 1947, I have to inform you that, upon the recommendation of the Chief of Engineers, and under



the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of the Army, to dredge for gold in Niukluk River, at just southeasterly of Council, Alaska, in accordance with the plans shown on the drawing attached hereto and marked: "Proposed Dredging of Placer Mining Claims on Niukluk River. Application by Alaska Placer Company, Seattle, Wash., Aug. 22, 1947," subject to the following conditions: [19]

(a) That the work shall be subject to the supervision and approval of the District Engineer, Engineer Department at Large, in charge of the locality, who may temporarily suspend the work at any time, if in his judgment, the interests of navigation so require.

(b) That any material dredged in the prosecution of the work herein authorized shall be removed evenly, and no large refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench, the formation of permanent ridges across the bed of the waterway shall be avoided and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore

above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial bulkhead or bulkheads, such as will prevent escape of the material into the waterway. If the material is to be deposited in the harbor of New York, or in its adjacent or tributary waters, or in Long Island Sound, a permit therefor must be previously obtained from the Supervisor of New York Harbor, Army Building, New York City.

(c) That there shall be no unreasonable interference with navigation by the work herein authorized.

(d) That if inspections or any other operations by the United States are necessary in the interests of navigation, all expenses connected therewith shall be borne by the permittee.

(e) That no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

(f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required, upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expira-

tion or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of the Army may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

(g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

(h) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the U. S. Coast Guard, shall be installed and maintained by and at the expense of the owner.

(i) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of

work, if for a period of more than one week, resumption of work, and its completion.

(j) That if the structure or work herein authorized is not completed on or before 31st day of December, 1950, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

(k) That this permit is revocable at the will of the Secretary of the Army.

(l) That the gold dredging operations will be conducted in such manner as to provide at all times unhindered passage of river traffic; to maintain free from obstruction existing channels, or to provide equivalent alternate channels; and that dredging spoil will be deposited shoreward from existing channels.

By authority of the Secretary of the Army:

/s/ THERON D. WEAVER,

Colonel, Corps of Engineers, Division Engineer.

War Department. O. C. of E. Form No. 96.

Revised Jan. 17, 1940. [20]

## 16

16





EXHIBIT No. 4

Circular No. 1667

United States

Department of the Interior

Bureau of Land Management

Washington

CODE OF FEDERAL REGULATIONS  
TITLE 43—PUBLIC LANDS: INTERIOR

Part 69—Mineral Lands: General Mining Regulations.

Authority: Sections 69.12 to 69.18, inclusive, issued under Act of August 8, 1947 (Public Law 383, 80th Cong.)

Sections 69.12 to 69.18, inclusive, are amended to read as follows:

Mining for gold and other precious metals in the beds and along the shores of navigable waters in Alaska.

Section 69.12. Purpose and authority. The Act of August 8, 1947 (Public Law 383, 80th Cong.) amends section 26 of the Act of June 6, 1900, as amended (31 Stat. 321, 52 Stat. 588; 48 U.S.C. 381) to authorize the exploration and mining for gold and other precious metals in Alaska in land below the line of ordinary high tide on tidal waters and below the line of ordinary high water mark on nontidal waters navigable in fact, subject to certain conditions. It is the purpose of Sections 69.12 to 69.18, inclusive, to set forth the conditions under which such exploration and mining operations may be conducted.

Section 69.13. Filing of notice of intention to mine. Any citizen of the United States, any person who has legally declared his intention to become such, any association of such citizens, or any corporation organized under the laws of the United States or of any State or Territory thereof, shall, before commencing actual operations file a notice of intention to mine or dredge for gold and other precious metals in any of the land described in the preceding section. This notice must be filed in triplicate in the nearest District Land Office, and should contain (a) the full name, address and citizenship of the person filing the notice, (b) a description of the place where the dredge will be initially located or the mining operations otherwise commenced, such place to be connected where practicable by course and distance to a corner of the public land survey on the shore, or if there are no surveyed lands in the vicinity, with the nearest, readily-ascertainable geographical or topographical point, (c) a statement that actual dredging or mining operations will be commenced no later than 90 days after the date of filing of the notice, and (d) a statement that the dredging or other mining operations will comply with all pertinent regulations and laws. [22]

Section 69.14. Area to be dredged. In order to assure the preservation of order and the avoidance of conflict, each dredge commencing operations in accordance with Sections 69.12 to 69.18, inclusive, shall not be interfered with by other dredging or mining operations within an area of 200 feet in



the direction of either bank and within a space of 500 feet up or down stream. This area shall be indicated by properly-placed buoys. Other dredges or boats are to have access to such area for passage and navigational purposes, but, while passing through that area, are not to extract any minerals nor engage in any dredging or moving of materials except as may be necessary for the actual movement of the equipment.

Section 69.15. Restrictions on dredge location. No dredge shall be placed in a position or be so operated as to interfere with the free passage of boats on nontidal waters navigable in fact or along the shore line of tidal waters, or interfere with the landing at any public wharf, or with other authorized means for landing stores or supplies. No dredge shall be located nearer to the shore than 100 feet from the line of ordinary low tide on tidal waters. Nor shall any dredge be located within the limits of frontage occupied by any townsite, mission or trading company with established entry under the law.

Section 69.16. Laws for the protection of navigable waters and fisheries. No dredging or other mining operations shall be conducted unless all the applicable laws and regulations relating to navigable waters and to the protection of fisheries are complied with.

Cross Reference: The regulations of the Fish and Wildlife Service of the Department of the Interior concerning fisheries are codified in 50 CFR. For regulations of the Department

of War concerning navigable waters, see 33 CFR.

Section 69.17. Prior rights protected. No dredging or other mining shall in any way be deemed to affect or impair any valid claims, rights or privileges arising under any other provision of law, including possessory claims under the first proviso of Section 8 of the Act of May 17, 1884 (23 Stat. 26).

Section 69.17a. Dredging under prior regulations. Dredging or other mining operations which were commenced after the date of enactment of the Act of August 8, 1947 (Public Law 383, 80th Cong.) but before the effective date of this revision of Sections 69.12 to 69.18, inclusive, and notices of intention to commence such operations which were filed between those two dates, are considered valid in all respects if there has been full compliance with the pertinent requirements of Sections 69.12 to 69.18, inclusive, as printed in 43 CFR, Cum. Supp.

Section 69.18. No title to be acquired; rights of future States. No dredging or other mining operations shall authorize, or be permitted to lead to, the acquisition of title to any of the land dredged or mined. [23] Any privileges acquired with respect to mining operations in land, title to which is later transferred to a future State upon its admission to the Union, and which is situated within its boundaries, shall be terminable, by such State, and

the mining operations shall be subject to the laws of such State.

/s/ FRED W. JOHNSON,  
Director.

Approved Nov. 26, 1947.

/s/ OSCAR L. CHAPMAN,  
Acting Secretary of the Interior. [24]

[Stamped]: Received U. S. Land Office, Nome, Alaska. Date Jan. 21, 1948.

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[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO  
INJUNCTION PENDENTE LITE

United States of America,  
Territory of Alaska—ss.

Ralph Lomen being first duly sworn upon oath deposes and says:

I am the President and General Manager of the Alaska Placer Company, defendant herein:

The Alaska Placer Company has complied with all laws prerequisite to the right to defend this action:

Plaintiff's action herein is based upon purported rights acquired by reason of placer mineral locations upon the Niukluk River below Council, Alaska, and upon a portion of the said river which is navigable. (See Civil Action No. 3473, this Court.): That a copy of the Judgment and the Decree rendered in the matter of Civil Action No. 3473, is attached hereto as Exhibit 1 and made a part hereof:

That any and all purported rights of plaintiff as alleged have been acquired by him with full knowledge of the navigability of the said Niukluk River and subsequent to the Judgment and Decree in Civil Action No. 3473 as aforesaid:

That by deed dated March 17, 1946, and recorded in Vol. 222, Page 498, Cape Nome Precinct Recording Records, Clyde Glass and Violet Glass purport to transfer by warranty deed the following claims "located on the Niukluk River"; to F. K. Dent,

Brown,  
Glass Fraction,  
Magnum,  
S & S,  
H & H,  
Surprise,  
Selassie,  
Glass Triangle,  
Leona.

That all the mining claims named in plaintiff's complaint are included in this said deed: That Clyde Glass, one of the grantors, was a party defendant in Civil Action, this Court, No. 3473, referred to hereinbefore, and it is specifically declared in said Judgment (besides other things) that ". . . Clyde D. Glass and John L. Ost as riparian owners of mineral claims do not, by virtue thereof, acquire any right, title or interest in or to the soil or the values therein below the line of ordinary high water, it being specifically declared that the above portion of the Niukluk [25] River is a part of the navigable waters of the Territory of Alaska.":

That on the 8th day of August, 1947, the President of the United States approved a law passed by Congress known as Public Law 383—80th Congress, which (among other things) subjected to exploration and mining of gold and other precious metals by citizens of the United States or persons who have legally declared their intention to become such, of all land below the line of ordinary high water mark on nontidal waters navigable in fact, within the jurisdiction of the United States: That a copy of said law is attached hereto marked Exhibit 2 and made a part hereof:

That on the 21st day of October, 1947, the United States, Department of the Army, Corps of Engineers, issued unto defendant herein a permit to dredge for gold in the Niukluk River just southeasterly of Council, Alaska: That a copy of said permit is attached hereto marked Exhibit 3 and made a part hereof:

That the United States, Department of Interior, Bureau of Land Management, by and through Circular No. 1667, approved November 26, 1947, prescribed rules and regulations under which mining for gold and other precious metals in the beds and along the shores of navigable waters in Alaska may be pursued: That a copy of Circular No. 1667 is attached hereto as Exhibit 4 and made a part hereof:

That defendant's entire mining operations on the Niukluk River over the period covered in plaintiff's complaint have been and now are within

the limits of the navigable waters of the Niukluk River below Council, Alaska, and in compliance with the law, permit and regulations referred to and set forth in this affidavit:

That at no time during the time defendant has been operating upon the Niukluk River as aforesaid has plaintiff attempted to mine on the said river below Council, Alaska, and defendant has at no time interfered with plaintiff in the matter of such operations; that plaintiff has never been ousted from the said river by the defendant or from any property to which he is legally entitled:

That plaintiff's affidavit filed in this cause in reference to an injunction *Pendente lite* is in many respects misleading and in certain respects untrue: That defendant herein claims no right to the bed of the navigable waters of the Niukluk River except as granted by and through the United States Government as hereinbefore set forth. That the drill logs referred to in plaintiff's affidavits show that there were thirty-six (36) completed drilling holes—one of which showed a value of \$2.00 per yard; one a value of \$2.25 per yard; one, wherein a nugget was recovered, of \$17.00 per yard; six between \$1.00 and \$2.00 per yard; and twenty-seven below \$1.00 per yard: That defendant has never mined and is not now mining on any mining property of plaintiff and has no intention of doing so:

That the present assets of defendant includes a flume dredge and machinery all in first-class condition, valued at \$100,000.00, and an Allis Chalmers tractor and dozer (H.P. 14), valued at \$12,000.00,

buildings valued at \$2,500.00, patented mining claims valued at \$5,000.00, other unpatented mining claims owned and leased by defendant, valued at \$20,000.00, and oil and supplies valued at \$10,000.00, and in addition to the rights and privileges held from the United States to mine and extract gold and other valuable minerals from the navigable waters of the Niukluk River, and that the total indebtedness of defendant does not exceed \$35,000.00: That this defendant is not insolvent and will be able to pay all damages which may be awarded to plaintiff by reason of his action: [26]

That a dredge operating in the short mining seasons of the Second Division of Alaska must operate the entire season in order for it to have a reasonably fair chance of making a profit, and that to enjoin defendant from the operation of its dredge would be a severe financial loss to the defendant, and such injunction cannot be justified through the pleadings and affidavits in this cause, actual facts and the law governing:

That defendant has filed its answer herein and affiant respectfully requests the Court to consider

these pleadings in connection with this affidavit and the motion of plaintiff herein.

/s/ RALPH LOMEN.

Subscribed and Sworn to before me the 24th day of August, 1948.

(Seal) /s/ C. C. TANNER,

Notary Public in and for the Territory of Alaska,  
residing at Nome. My commission expires July  
18, 1950.

Copy received this 24th day of August, 1948.

CHAS. J. CLASBY,  
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 25, 1948. [27]

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[Printer's Note]: Exhibits 1, 2, 3, and 4 are identical with Exhibits 1, 2, 3, and 4 attached to the Answer and are set out at pages 20, 23, 26, 33, of this printed record.

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[Title of District Court and Cause.]

REPLY AFFIDAVIT—F. K. DENT

United States of America,  
Territory of Alaska—ss.

F. K. Dent, being first duly sworn upon his oath deposes and says: That I am the Plaintiff in the above entitled action and make this affidavit in support of my Motion for an Injunction Pendente Lite.



That attached hereto marked "Exhibit A" is a full, true and correct copy of circular No. 1667 issued by the United States of the Interior. That regulations therein promulgated are the only regulations, to affiant's knowledge, that have been issued by said Department under the authority of the Act of Congress of August 8, 1947; and to affiant's knowledge said regulations are still in force and effect.

That attached hereto marked "Exhibit B" is a full, true and correct copy of the minutes of a meeting of miners held at Council, Alaska on the 29th day of June, 1948. That to affiant's knowledge the rules and regulations concerning the temporary possession of the bed of the Niukluk River, where navigable, have not been since altered, amended or changed and are now in full effect and force.

Further affiant saith not.

/s/ F. K. DENT. [38]

Subscribed and Sworn to before me this 24th day of August, 1948.

(Seal) /s/ NORVIN W. LEWIS,  
Clerk of the District Court, Territory of Alaska,  
Second Division.

Copy received Aug. 25, 1948.

C. C. TANNER,  
Atty. for Defendant.

[Printer's Note]: Exhibit "A" is similar to Exhibit No. 4, attached to Answer, page 33, of this printed Record. [39]

## “EXHIBIT B”

MINUTES OF MINERS MEETING  
COUNCIL, ALASKA

June 29, 1948

Pursuant to notice dated June 28, 1948, the people assembled in the School House, Council, Alaska, for the purpose of organizing a Miners' Meeting. Meeting was called to order at 3:37 p.m., and nominations for temporary chairman and temporary secretary was called for. Whereupon Mr. Allen Lee nominated F. K. Dent as temporary chairman and Mr. Nels Swanberg, Jr., as temporary secretary, and upon vote, the nominations were carried.

The temporary chairman then called for nominations of a permanent chairman. Mr. Clyde D. Glass nominated F. K. Dent, seconded by Mr. Nels Swanberg, Jr. There were no other nominations and motioned carried.

The chairman then called for nominations of a permanent secretary. Mr. Richard E. Lee nominated Mr. Nels Swanberg, Jr., seconded by Mr. Allen W. Lee. There being no other nominations, motioned carried.

The chairman then stated that the purpose of organizing a Miners' Meeting in Council, Alaska, was to adopt rules and regulations for the mining of navigable streams and for such other business that might be brought before the Miners' Meeting for action.

The chairman then appointed Mr. Richard E. Lee and Mr. Nels Swanberg, Jr., to act with the

chairman to propose rules and regulations to be submitted to the Miners' Meeting for consideration.

The committee submitted the following rules and regulations:

### Rule 1.

Owner, or owners, of valid placer locations embracing within its boundaries any portion of the bed of a navigable stream shall have the exclusive right to prospect and mine said portion of the bed of a navigable stream so long as such valid mining locations are maintained in effect under the laws of the United States, or the Territory of Alaska.

### Rule 2.

The owner, or owners, of valid placer mining locations abutting ordinary high water on the banks of navigable rivers shall have the exclusive right to prospect and mine the beds of navigable streams abutting such placer mining locations from mean high water to the center or thread of the stream at summer low water so long as such mining locations remain in effect under the laws of the United States, or the Territory of Alaska.

### Rule 3.

The rights of exclusive possession for the purpose of prospecting and mining in these rules and regulations provided are for the temporary use of the beds of navigable streams, shall not confer any property right, and apply with equal force and effect to all valid mining locations heretofore made, and all those hereafter made. The applications of

these rules is by this meeting limited to the Niukluk River in the Council District of the Seward Peninsula.”

Mr. Allen W. Lee moved that the above rules submitted by the Committee be accepted. Motion seconded by Mr. Clyde D. Glass. The chairman then called for discussion, and a lengthy discussion followed. The chairman then called for a vote on the question. The following members voted for the adoption of the rules and regulations as submitted: Lee R. Taylor, R. O. Lee, B. L. Crosby, Knute Olson, Richard E. Lee, Mrs. F. K. Dent, Clyde D. Glass, Nels Swanberg, Jr., William Brookins, L. Tinkham, Axel T. Edman, A. C. Brown, Allen W. Lee, Max Ellingson, Nels Swanberg, Sr., F. P. Durocher.

The following members refused to vote either for or against: Ralph Lomen, Warren Davis, Charley Gustavson.

There being no further business to come before the meeting, the same was adjourned at 5:00 p.m.

NELS SWANBERG, JR.,  
Secretary.

F. K. DENT,  
Chairman.

[Endorsed]: Filed Aug. 25, 1948.

[43]

[Title of District Court and Cause.]

REPLY AFFIDAVIT—F. K. DENT

United States of America,  
Territory of Alaska—ss.

F. K. Dent, being first duly sworn, on his oath deposes and says:

I am the plaintiff in the above entitled action, and make this affidavit in support of my petition for the entry herein of a temporary restraining order.

Plaintiff denies that defendant's mining operations, or any part thereof, are authorized or are in compliance with the law, permit, and regulations referred to in the affidavit of Ralph Lomen, and affirms that said operations are in violation of the legal rights of plaintiff.

Affiant states he is legally entitled to the temporary exclusive possession of the bed of the Niukluk River, in the area alleged, and that the admitted acts of defendant constitute an ouster.

Further affiant sayeth not.

/s/ F. K. DENT.

Subscribed and Sworn to before me this 24th day of August, 1948.

(Seal) /s/ NORVIN W. LEWIS,

Clerk of Court, Second Division, Territory of Alaska.

Copy received this 25th day of August, 1948.

/s/ C. C. TANNER,

Attorney for Defendant.

[Endorsed]: Filed Aug. 25, 1948.

[44]

[Title of District Court and Cause.]

### STIPULATION

Comes now the respective parties above named by and through their attorneys of record herein and stipulate that the hearing on the order to show cause relating to a temporary injunction this day by the court set for August 30, 1948, be reset to, and heard upon, the 31st day of August, 1948, at the hour of 2 o'clock in the afternoon.

Dated August 26, 1948.

/s/ C. C. TANNER,

Attorney for Defendant.

COLLINS and CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 26, 1948.

[45]

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[Title of District Court and Cause.]

### SECOND AFFIDAVIT IN OPPOSITION TO INJUNCTION PENDENTE LITE

United States of America,  
Territory of Alaska—ss.

Ralph Lomen, after being first duly sworn, upon oath deposes and says:

I am the President and General Manager of Alaska Placer Company, defendant herein, and I make this second affidavit in opposition to an injunction pendente lite for the reason that plain-

tiff, by his "Reply" Affidavits filed herein, has injected new issues into the controversy at hand.

That F. K. Kent, ever since soon after the judgment in this Court in Civil action No. 3473, dated Sept. 29, 1941, (copy of which being attached to defendant's first affidavit filed herein as exhibit 1) has been endeavoring to get a monopoly and the exclusive control, for mining purposes, of the navigable waters of the Niukluk River below Council, Alaska, and in support of this, affiant submits the following taken from the recording records of the Cape Nome Precinct, Second Division, Alaska.

(All claims listed are on the Niukluk River below Council, and cover the area in controversy.) [46]

### I—DEEDS

Deed dated March 7, 1942 F. P. Durocher to F. K. Dent conveys  $\frac{1}{2}$  interest in Glass Fraction. Rec. Vol. 222, Page 498: Filed March 14, 1946.

Deed dated June 1, 1942. C. O. Steiner to F. K. Dent conveys "my interest" in Glass Fraction, Magnum, S & S, H & H, Surprise, Selassie, Leona, Brown, Florence, Rainbow. Rec. Vol. 222, Page 496: Filed for record March 14, 1946.

Deed dated June . . , 1942. S. W. Hensel and Mattie Hensel to F. K. Dent conveys—all of claims named just above. Rec. Vol. 222, Page 497: Filed for record March 14, 1946.

Deed (Warranty) dated March 4, 1946. Clyde Glass and Violet Glass to F. K. Dent. Conveys following claims: Brown, Glass Fraction, Magnum, S & S, H & H, Surprise, Selassie, Glass Triangle,

Leona. Rec. Vol. 222, Page 498: Filed March 14, 1946.

Deed dated March 4, 1946. F. P. Durocher to F. K. Dent. Conveys following claims: Lucky, Timber, Ice, Moon, Rocker, River, Gracie. Rec. Vol. 222, Page 499: Filed March 14, 1946. [47]

## II—LOCATIONS

The following locations are on record purportedly covering all of the Niukluk River from Melsing Creek, for miles down stream: Located by F. K. Dent and others and claimed by F. K. Dent as owner, as shown in "Notices of Holding Mining Claims" hereinafter set forth:

Idaho Claim—Rec. Vol. 220 P. 440. Located Oct. 1, 1942. 850x600 900x650 feet. Adjacent to Melsing Creek. (One locator)

Georgia Ass'n—Rec. Vol. 220 P. 437. Located Sept. 30, 1942. 1320x1320 feet. 1000 feet below Melsing Creek. (One locator)

Florida Ass'n—Rec. Vol. 220 P. 438. Located Sept. 30, 1942. 1320x1320 feet. One-half mile below Council. (One locator)

Delaware Ass'n—Rec. Vol. 220 P. 439. Located Sept. 30, 1942. 1320x1320 feet. Three-fourths mile below Council. (One locator)

Colorado Ass'n—Rec. Vol. 220 P. 438. Located Sept. 30, 1942. 1320x1320 feet. One mile below Council. (One locator)

Indiana Claim—Rec. Vol. 220 P. 441. Located Oct. 1, 1942. 2640x500 feet. One mile from Council. (One locator)



Illinois Claim—Rec. Vol. 220 P. 441. Located Oct. 1, 1942. 1320x660 feet. One mile from Council. (One locator)

Arizona Ass'n—Rec. Vol. 220 P. 437. Located Oct. 1, 1942. 1320x1320 feet. One and one-half miles below Council. (One locator)

Iowa Claim—Rec. Vol. 220 P. 439. Located Oct. 1, 1942. 780x1100x780x780 feet. One and one-half miles below Council. (One locator) [48]

Alabama Triangle—Rec. Vol. 220 P. 440. Located Oct. 1, 1942. 1320x1320x1750 feet. Two miles below Council. (One locator)

Arkansas Ass'n—Rec. Vol. 220 P. 437. Located Oct. 1, 1942. 1320x1320 feet. 1320 feet above Bear Creek. (One locator)

### III—NOTICES—INTENTION TO HOLD CLAIMS

Notices of Intention to hold all of the above claims were filed by or for F. K. Dent as "Owner" as follows:

July 1, 1943—Rec. Vol. 223 P. 167

June 27, 1944—Rec. Vol. 223 P. 269

June 21, 1945—Rec. Vol. 223 P. 412

That in order to gain this monopoly and control of the Niukluk River, F. K. Dent has not only located or caused to be located the foregoing claims (which were evidently not located in accordance with law), and secured deeds as heretofore shown, but in addition thereto he has for several years past had the services of one or another of the following attorneys: O. D. Cochran, Herbert L. Faulk-

ner and Chas. J. Clasby—for the primary purpose of keeping all persons but himself and others closely associated with him from mining the navigable bed of the Niukluk River.

That in a further attempt to monopolize the said river and to keep others from mining thereon, F. K. Dent mailed to Alaska Placer Company from Seattle, Washington, (with letter dated Sept. 23, 1947) the following instrument:

“Notice of Intention to Dredge in Navigable Waters

Notice is hereby given that pursuant to Public Law 383, 80th Congress, Chapter 514, 1st Session, entitled

“An Act to amend section 26, title I, chapter I, of the Act entitled “An Act making further provision for a civil government for Alaska, and for other purposes”, Act of May 31, 1938 (52 Stat. 588).

the undersigned, owner of the following described placer mine claims, to-wit: [49] Glass Fraction, Glass Triangle, Florence, Rocky, Magnum, Rainbow, Timber, Bear, S & S, Leona, River, Lucky, H & H, Water, Moon, Ice, situated on and in the Niukluk River near Council, Alaska in latitude approximately 64 degrees 53 minutes North and longitude approximately 163 degrees 40 minutes West, does intend to dredge for gold and other precious metals in the waters of the Niukluk River and in the gravel bars thereof adjacent covered by the above named placer mining claims, location notices of which are on record in the office of the Recorder for the recording district at Nome, Alaska

and which claims were located as placer mining ground by Clyde D. Glass of 8150 Ninth S.W., Seattle, and Fred Durocher of Council, Alaska and which is under lease and option to the undersigned and has been under lease and option for several years last past.

The undersigned has a permit from the District Engineer, U. S. War Department, to dredge this ground and which permit is dated February 11, 1946 at Seattle, Washington.

The undersigned has claimed and does now claim ground covered by the placer mine locations and claims aforesaid and hereinabove mentioned and these claims were formerly occupied and mined by the predecessors in interest of the undersigned and mining operations thereon were interrupted by order of the district court at Nome, Alaska on September 29, 1941 and since that date no mining has been permitted upon the claims of the undersigned until the passage of the Act of Congress hereinabove mentioned.

This notice is given to all persons that the undersigned and his predecessors in interest have held these mining claims for more than ten years and intends to hold them and to occupy them and dredge for gold and precious metals thereon and that legal proceedings will be commenced against all trespassers thereon. The undersigned is now the owner and entitled to the possession of all of the mining claims hereinabove mentioned, part of which are above the line of high water and part below. All persons trespassing on the claims will be prosecuted.

Notice is further given that the undersigned has applied to the Bureau of Land Management, Department of the Interior, Washington, D. C. for a formal permit to mine the ground aforesaid under the provisions of Public Law 383 and the application is pending pursuant to regulations which are now being prepared by the Bureau of Land Management.

Done at Nome, Alaska the 23rd day of Sept., 1947.

/s/ F. K. DENT."

That to the best knowledge and belief of affiant, F. K. Dent has never mined or attempted to mine the bed of Niukluk River below Council.

That the purported Miners Meeting set forth in plaintiff's reply affidavit is a still further attempt on plaintiff's part to circumvent the law and gain his desired control: That the only notice given in respect to the said meeting was an unsigned [50] written notice delivered to hand-picked individuals in the vicinity of Council on June 28, 1948, calling for a meeting June 29, 1948; that a copy of such notice which was delivered to affiant June 28, 1948, by F. K. Dent is as follows:

#### “NOTICE OF MINERS MEETING

Notice, There will be a Miners Meeting held in the School House, Council, Alaska, Tuesday, June 29th, 1948, at 3:30 p.m. to transact any business that might be presented at the meeting.

Please take due notice.

Dated June 28, 1948.”

That everything done at this said meeting had been prearranged; the rules and regulations had been prepared by the plaintiff's lawyers prior to the meeting and were not changed.

That this meeting was held subsequent to the publication of rules and regulations of the Department of Interior relative to mining operations on navigable rivers in Alaska, and subsequent to defendant's mining on the said river, in pursuance to these regulations and the law provided.

That to the best information and belief of affiant, the only mining district which includes that portion of the Niukluk River in controversy is the Cape Nome Precinct.

That it is the belief of affiant that the aforesaid rules are in controvention of existing law and the rules and regulations published in accordance therewith.

That F. K. Dent has been appraised of and aware of the intention of defendant to mine in the navigable waters of the Niukluk River below Council, Alaska, prior to the fall of 1947 when it floated its dredge down the river to prepare for 1948 operations: That in the month of October, 1947, Mr. Dent informed G. R. Jackson, of Nome, Alaska, and also Al Anderson, Sect. of the Alaska Miners Association, that he was going to sue defendant in respect to the matter now before the Court: That for several years last past he has had attorneys retained in this matter, but [51] nevertheless, with all of this before him he has waited until the middle of the 1948 mining season,

when defendant's dredge is in operation, to bring action and enjoin defendant.

/s/ RALPH LOMEN.

Subscribed and sworn to before me the 30th day of August, 1948.

(Seal) /s/ C. C. TANNER,  
Notary Public for Alaska. My commission expires  
July 18, 1950.

[Endorsed]: Filed Aug. 30, 1948. [52]

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In the District Court for the Territory of Alaska  
Second Division.

Case No. 3781—Civil

F. K. DENT,

Plaintiff,

vs.

ALASKA PLACER COMPANY,  
a Corporation,

Defendant.

### OPINION

Charles J. Clasby, Fairbanks, Alaska, Attorney for  
Plaintiff. C. C. Tanner, Nome, Alaska, Attorney  
for Defendant.

Plaintiff brings an action in ejectment against the defendant corporation and applies for a temporary restraining order pending the trial of the action.

The complaint alleges that the plaintiff is now, and for more than six years last past has been,

the owner in fee as to all persons, save and except the United States of America, and has been and now is entitled to the exclusive possession of six (6) placer mining claims all situated "on or across" the Niukluk River, except one (1) claim situate on the right limit of that river. It further alleges that such locations specifically include the right of exclusive possession of all of the bed of the Niukluk River within the end lines of said claims, and that the defendant Corporation, on or about the 15th day of September, 1947, ousted an dejected plaintiff therefrom, and now wrongfully and unlawfully withholds them from plaintiff to his damage in the sum of One Hundred Twenty Thousand (\$120,000.00) Dollars, by reason of its mining the same with a dredge, thus depleting plaintiff's estate. The defendant corporation admits that it has operated a gold dredge during the [53] time and at the place alleged by the plaintiff.

It appears from the affidavits and pleadings filed in the case that the Niukluk River is a navigable stream, navigable in fact, and so declared to be in the case of the United States of America vs. Clyde D. Glass, et al., No. 3473, in this Court decided September 29th, 1941.

The affidavits also set forth in full the Act of Congress (Public Law 383—80th Congress—Title 48, Section 381), approved August 8, 1947, under the terms of which both plaintiff and the defendant corporation claim they are entitled to conduct mining operations. The Act follows:

"The laws of the United States relating to mining claims, mineral locations, and rights incident

thereto are extended to the Territory of Alaska: Provided, that, subject only to the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, and to the laws for the protection of fisheries, and subject also to such general rules and regulations as the Secretary of the Interior may prescribe for the preservation of order and the prevention of injury to the fisheries, all land below the line of ordinary high tide on tidal waters and all land below the line of ordinary high-water mark on nontidal water navigable in fact, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining district may have heretofore made, or may hereafter make, governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: Provided further, that the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the Secretary of the Interior authorizing any person or persons, corporation, or company, to excavate or mine under any of said waters, and if such exclusive permit has been granted, it is hereby revoked and declared null and void. [54] The rules and regulations prescribed by the Secretary of the Interior under this section shall not, however,



deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation or impair the fisheries, and the reservation of a roadway sixty feet wide under 462 of this Title shall not apply to mineral lands or townsites. No person shall acquire by virtue of this section any title to any land below the line of ordinary high tide or the line of ordinary high-water mark, as the case may be, of the waters described in this section. Any rights or privileges acquired hereunder with respect to mining operations in land, title to which is transferred to a future state upon its admission to the Union, and which is situated within its boundaries, shall be terminable by such state, and the said mining operations shall be subject to the laws of such state.

Section 2. Nothing in this Act shall be deemed to affect or impair any valid claims, rights or privileges, including possessory claims, under the first proviso of Section 8 of the Act of May 17, 1884, (23 Stat. 26) arising under any other provision of law."

Plaintiff attaches to his reply affidavit a copy of minutes of a miners' meeting held at Council, Alaska, on the Niukluk River, on June 29, 1948, containing rules and regulations adopted thereat, but limited by their terms to the Niukluk River, as follows:

"Rule 1. Owner, or owners, of valid placer locations, embracing within its boundaries any por-

tion of the bed of a navigable stream shall have the exclusive right to prospect and mine said portion of the bed of a navigable stream so long as such valid mining locations are maintained in effect under the laws of the United States, or the Territory of Alaska.”

“Rule 2. The owner, or owners, of valid placer mining locations abutting ordinary high water on the banks of navigable rivers shall have the exclusive right to prospect and mine the beds of navigable streams abutting such placer mining locations from mean high water to the center or thread of the stream at summer low [55] water, so long as such mining locations remain in effect under the laws of the United States or the Territory of Alaska.”

“Rule 3. The rights of exclusive possession for the purpose of prospecting and mining in these rules and regulations provided are for the temporary use of the beds of navigable streams, shall not confer any property right, and apply with equal force and effect to all valid mining locations heretofore made and all those hereafter made.”

The Court will take judicial notice of the fact that for many years past the Cape Nome Recording Precinct, including within its boundaries the claims of the plaintiff and all of the Niukluk River, has been established under law as a recording district with a recorder whose duty it is to receive and record records pertaining to mining locations and other rights, including water rights, and that the practice of establishing mining dis-

tricts in Alaska and the holding of miners' meetings for the purpose of establishing mining districts and the adoption by the miners of rules and regulations governing matters long since provided for by law, have been discontinued. Congress knew of the establishment of our Territorial Legislature and undoubtedly knew that the Legislature was empowered to enact statutes governing the mining of placer claims in matters not in conflict with the powers of Congress over the public domain.

The rules and regulations show that the plaintiff who claims the right by reason of his placer locations "on and across" the Niukluk River, to mine the bed of that stream, was chairman of the miner's meeting. The pleadings further show that he has known of the operations of the defendant corporation since September 15, 1947. The record fails to show that he has filed with the Secretary of Interior the notice of intention to prospect or mine the [56] bed of the stream. The plaintiff may even at this date go upon the Niukluk River and prospect and mine its bed by complying with the rules and regulations of the Secretary of the Interior, since by the Act's terms, the Secretary is prohibited from granting an exclusive right to any person to mine the beds of navigable waters.

The beds of streams navigable in fact have never been considered as public lands. They were not granted by the Constitution to the United States, but are held in trust for the future state. They cannot be acquired as part of placer mining claims,

since such claims extend only to the ordinary high water mark of the stream.

Lindley on Mines (3rd Ed) Section 428.

The plaintiff in this case asserts that because his five claims are "on or across" the Niukluk River, he has an exclusive right to prospect and mine the portion of the bed of that stream which lies within his claims. Certainly before the passage of the Act of August 8, 1947 above set forth, he had no such right.

As stated in *Columbia Canning Company vs. Hampton*, 161 Fed. 60, "\* \* \* that while the owner or locator of lands in Alaska which border on navigable or tidal waters has, under the general laws, the right of access to such waters for purposes of navigation, he can acquire no right or title in the soil below high-water mark, and he can have, therefore, no right of possession upon which he can base an action against an intruder whom he charges with interfering with or obstructing him in the erection and use of a structure upon the shore below high-water mark".

Does the Act of August 8, 1947 give him the exclusive right to prospect for and mine gold in the bed of the navigable stream which his claims cross? [57]

A reading of the Act will disclose that it was the intent of Congress to provide no exclusive right to the lands under navigable waters. The conditions under which mining for gold or other precious metals may be taken apply to all citizens and those who have legally declared their inten-

tion to become such, subject, however, to the laws enacted by Congress for the protection and preservation of navigable waters, the fisheries, and under rules and regulations by the Secretary of the Interior, for the preservation of order and the prevention of injuries to the fisheries.

The Act in Section 2 provides:

“Sec. 2. Nothing in this Act shall be deemed to affect or impair any valid claims, rights or privileges, including possessory claims under the first proviso of Section 8 of the Act of May 17, 1884 (23 Stat. 26) arising under any other provision of law.”

It is argued by plaintiff that this Section secures to plaintiff the right to prospect and mine the bed of the Niukluk River below the line of ordinary high-water mark on those claims which are “on and across” that river. It is clear that prior to the passage of the Act of August 8, 1947, plaintiff had no right or claim to the bed of that river, it being navigable in fact. Section 2 protects only valid claims, rights and privileges existing before and at the time of the passage of the Act. Since plaintiff and his predecessors in interest had been foreclosed from claiming any such claim, right or privilege in the bed of that stream, he cannot now invoke Section 2 to bring into existence that which he had never had.

A careful study of the pleadings and affidavit fails to convince the Court that the plaintiff has such a clear right to entitle him to injunctive relief. [58] He must depend upon the strength

of his own title and not on the weakness of that of his opponent. Any valid claim, right or privilege which he had and now has is limited to that portion of his placer locations which are a part of the public domain. He has failed to show, either in his pleadings or affidavits that he has complied with the rules and regulations of the Secretary of the Interior which provide (Circular 1667, U. S. Dept. of Int. Bureau of Land Management, Title 43—Section 69.12 to 69.18, promulgated November 26, 1947):

“Any citizen of the United States, any person who has legally declared his intention to become such, any association of such citizen, or any corporation organized under the laws of the United States or of any State or Territory thereof, shall, before commencing actual operations, file a notice of intention to mine or dredge for gold and other precious metals in any of the land described in the preceding section. This notice must be filed in triplicate in the nearest District Land Office, and should contain (a) the full name, address and citizenship of the person filing the notice; (b) a description of the place where the dredge will be initially located or the mining operations otherwise commenced, such place to be connected where practicable by course and distance to a corner of the public land survey on the shore, or if there are no surveyed lands in the vicinity, with the nearest, readily-ascertainable geographical or topographical point; (c) a statement that actual dredging or mining operations will be commenced no later

than 90 days after the day of the filing of the notice, and (d) a statement that the dredging or other mining operations will comply with all pertinent regulations and laws.”

The injunction pendente lite will be denied.

Dated at Nome, Alaska, this 7 day of September, 1948.

JOSEPH W. KEHOE,  
U. S. District Judge

[Endorsed]: Filed Sept. 7, 1948. [59]

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In the District Court for the Territory of Alaska  
Second Division

No. 3781—Civil

F. K. DENT,

Plaintiff,

vs.

ALASKA PLACER COMPANY, a Domestic  
Corporation,

Defendant.

ORDER DENYING INJUNCTION PENDENTE  
LITE

The application for an injunction pendente lite in the above-entitled case having been heard pursuant to the order of the court made on the 11th day of August, 1948; and the Court having heard the arguments of the attorneys for the respective parties, and having duly considered the pleadings and the affidavits filed herein.

It is hereby ordered that the application of the plaintiff in this case for an injunction pendente lite be, and the same is hereby, denied.

Dated, the 7th day of September, 1948.

/s/ JOSEPH W. KEHOE,  
U. S. District Judge.

[Endorsed]: Filed Sept. 7, 1948. [60]

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[Title of District Court and Cause]

### NOTICE OF APPEAL

To Alaska Placer Company, the Defendant above named, and to C. C. Tanner, its Attorney:

Notice is hereby given that the above named Plaintiff hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, from the Interlocutory Order denying Injunction Pendente Lite made and entered in this action by the above entitled Court, on the 7th day of September, 1948, wherein it was ordered that the application of the Plaintiff for an Injunction Pendente Lite restraining the Defendant from the mining and extracting of minerals from the mining claims of Plaintiff more particularly described in the Complaint on file in the above entitled action was denied.

COLLIN & CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for Plaintiff.

(Acknowledgement of Service.)

[Endorsed]: Filed Oct. 1, 1948. [61]



[Title of District Court and Cause]

## PETITION FOR ALLOWANCE OF APPEAL

The above-named Plaintiff, F. K. Dent, considering himself aggrieved by the Interlocutory Order of this court made and entered in the above-entitled action on the 7th day of September, 1948, in favor of the Defendant, and against the Plaintiff, wherein it was ordered that the application of the Plaintiff for an Injunction Pendente Lite restraining and enjoining the Defendant from mining and extracting gold and other precious metals from the mining claims of Plaintiff described in the Complaint on file in the above entitled cause was denied, does hereby appeal from said order and the whole thereof to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified and set forth in the Assignment of Errors, which is filed herewith, and the said Plaintiff prays that this appeal be allowed and that a transcript of the record, proceedings and papers upon which the said order was made duly authenticated by the Clerk of the Court may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Dated at Fairbanks, Alaska, this 29th day of September, 1948.

COLLINS & CLASBY,  
By /s/ CHAS. J. CLASBY,  
Attorneys for Plaintiff.

(Acknowledgement of Service.)

[Endorsed[: Filed Oct. 1, 1948. [62]

[Title of District Court and Cause]

### ASSIGNMENT OF ERRORS

Comes now the Plaintiff above named and alleges that the Order of the above-entitled Court, entered in the above entitled cause on the 7th day of September, 1948, denying Plaintiff's application for an Injunction Pendante Lite, is erroneous, unjust to him, and files with his petition for an Allowance of Appeal the following assignment of error upon which he will rely:

#### I.

The Court erred in denying Plaintiff's application for the issuance of an interlocutory order restraining and enjoining Defendant, during the pendency of this action, from the mining and extraction of gold and other metals from the mining claims of Plaintiff described in the complaint of plaintiff on file in the above entitled cause.

Wherefor, Plaintiff prays that said Order be reversed and the cause remanded with the mandate to enter therein said Injunction Pendante Lite as applied for in the application of plaintiff.

COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for Plaintiff.

(Acknowledgement of Service.)

[Endorsed]: Filed Oct. 1, 1948. [63]

[Title of District Court and Cause]

ORDER ALLOWING APPEAL AND FIXING  
AMOUNT OF COST BOND

Now, on this 1st day of Oct., 1948, the same being one of the days of the General.....1948 Term of this Court, this cause came on regularly to be heard upon the Petition of the Plaintiff above named for the allowance of an appeal on behalf of said Plaintiff from the Interlocutory Order entered in this cause on the 7th day of September, 1948, denying Plaintiff's application for the issuance of an injunction pendente lite and for the fixing of the amount of the cost bond on said Appeal and the court being duly advised in the premises does hereby find that said order is one from which appeal can be taken and that the cost bond herein should be fixed at the sum of \$250.00.

Now Therefore, It Is Ordered That the Appeal of said Plaintiff from the Interlocutory order entered herein on the 7th day of September, 1948, denying the application of Plaintiff for the issuance of an injunction pendente lite be and the same is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit, and that a certified copy of the transcript of record, proceedings, affidavits, orders and all other proceedings in this matter, upon which said Interlocutory Order appealed from is based, be transferred, duly authenticated, to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California. [64]

It is further ordered that the amount of the Cost Bond herein be and the same is hereby fixed at the sum of Two Hundred Fifty Dollars (\$250.00).

Dated at Nome, Alaska, this 1st day of Oct., 1948.

/s/ JOSEPH W. KEHOE,  
District Judge.

Presented by:

/s/ CHAS. J. CLASBY,  
One of the Attorneys for  
Plaintiff.

(Acknowledgement of Service.)

[Endorsed]: Filed Oct. 1, 1948. [65]

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[Title of District Court and Cause]

**COST BOND ON APPEAL**

Know All Men by These Presents:

That we, F. K. Dent, as principal, and American Casualty Company of Reading, Pennsylvania, as surety, are hereby held and firmly bound unto the United States of America in the sum of Two Hundred Fifty Dollars, (\$250.00), lawful money of the United States to be paid for the use and benefit of the Defendant above named, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, as the case may be, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 4th day of Oct., 1948.

The condition of the above obligation is such that:

Whereas the above bounden Plaintiff has filed his petition for appeal and is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain Interlocutory Order denying the application of Plaintiff for the issuance of an injunction Pendente Lite, which order was entered and rendered in the above entitled Court and cause on the 7th day of September, 1948; and

Whereas said Plaintiff desires to appeal from said Interlocutory Order and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said Interlocutory Order, and have given [66] to Defendant in said action, Notice of Appeal as required by law, and said Court having duly fixed the amount of the Cost Bond at Two Hundred Fifty Dollars (\$250.00);

Now Therefore, if the Plaintiff above named shall prosecute said appeal to effect and answer all costs that may be adjudged against him if he shall

fail to make his plea, then this obligation shall be void; otherwise to remain in full force and effect.

(Seal)           /s/ F. K. DENT,  
Principal  
American Casualty Company of  
Reading, Pennsylvania.

By /s/ R. H. McDONALD,  
Surety, Atty.-in-fact.

Copy received this 13th day of October, 1948.

C. C. TANNER,  
Attorney for Defendant.

Bond approved this 13th day of October, 1948.

/s/ JOSEPH W. KEHOE,  
District Judge. [67]

Affidavit of R. H. McDonald, Attorney-in-Fact of  
American Casualty Company of Reading, Penn-  
sylvania.

State of Washington,  
County of King—ss.

R. H. McDonald being just and duly sworn, deposes and says that he is the Attorney-in-fact for the American Casualty Company of Reading, Pennsylvania, and as such is authorized to and does make this affidavit on behalf of the said company and states that the said company has complied with the Provisions of Section 3089 of the compiled laws of Alaska and has complied with the laws of the United States and Alaska; That said company is duly authorized by law to act as Surety in the Territory of Alaska; and that affiant has been de-

signed and is authorized by said company to make this affidavit.

[Seal]                      American Casualty Company,  
By /s/ R. H. McDONALD,  
Attorney-in-fact.

State of Washington,  
County of King—ss.

On this 4th day of October, 1948, before me personally came R. H. McDonald to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

[Seal]            /s/ E. PEARSON,  
Notary Public in and for the State of Washington,  
residing at Seattle, Wash.

My commission expires March 11, 1949.

[Endorsed]: Dated Oct. 13, 1948. [68]

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[Title of District Court and Cause]

**STIPULATION RE: PRINTING OF RECORD**

It is hereby stipulated by and between the above named parties, Plaintiff and Defendant, through their respective Attorneys, that in printing the papers and records to be used on the hearing on appeal in the above entitled cause, for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit, the title of the Court and Cause in full on all papers shall be omitted, except on the first page of said record and that there shall be inserted in place of said title on all

papers used as a part of said records the words "Title of Court and Cause." Also that all endorsements on said papers used as a part of said record shall be omitted except the Clerk's file marks and the admission of service.

Dated at Nome, Alaska, this 1st day of Oct., 1948.

COLLINS & CLASBY,

By /s/ CHAS J. CLASBY,

Attorneys for Plaintiff and  
Appellant.

/s/ C. C. TANNER,

Attorney for Defendant and  
Appellee.

[Endorsed]: Filed Oct. 1, 1948. [69]

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[Title of District Court and Cause]

**PRAECIPE FOR TRANSCRIPT OF RECORD**

To: Norvin W. Lewis, Clerk of the above entitled Court.

You will please prepare transcript of record in the above entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, upon the appeal heretofore perfected to said Court, and include therein the following papers and records, to-wit:

1. Complaint.
2. Application for Injunction Pendente Lite.
3. Affidavit in Support of Injunction Pendente Lite.



4. Order to Show Cause.
5. Answer.
6. Affidavit in Opposition to Injunction Pendente Lite.
7. Reply Affidavit, F. K. Dent.
8. Reply Affidavit, F. K. Dent.
9. Stipulation (re Setting hearing)
10. Second Affidavit in Opposition to Injunction Pendente Lite.
11. Opinion.
12. Order denying Injunction Pendente Lite.
13. Notice of Appeal.
14. Petition for Appeal.
15. Assignment of Errors.
16. Order Allowing Appeal and Fixing Cost Bond.
17. Cost Bond on Appeal.
18. Citation.
19. Stipulation on Printing of Record.
20. Praecipe.

This transcript is to be prepared as required by law and the rules and orders of this Court and the Circuit Court of Appeals for the Ninth Circuit, and is to be forwarded to said Court at San Francisco, California, so that it will be docketed therein on or before the 10th day of Nov., 1948. [70]

Dated at Fairbanks, Alaska, this 5th day of October, 1948.

COLLINS & CLASBY,  
By CHAS. J. CLASBY,  
Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 13, 1948. [71]

## CERTIFICATE OF CLERK

United States of America,  
Territory of Alaska,  
Second Division—ss.

I, Norvin W. Lewis, Clerk of the District Court for the Territory of Alaska, Second Division, do hereby certify that the foregoing Transcript on Appeal consisting of typewritten pages, from 1 to 73 both inclusive, is a true and exact transcript of the Complaint, Application for Injunction Pendente Lite, Affidavit in Support of Injunction Pendente Lite, Order to Show Cause, Answer with Exhibits 1, 2, 3 and 4 attached, Affidavit in Opposition to Injunction Pendente Lite with Exhibits 1, 2, 3 and 4, attached, Reply Affidavit of F. K. Dent, with copy of circular No. 1667, United States Department of the Interior, Bureau of Land Management and Minutes of Miners Meeting, Council, Alaska dated June 29, 1948, attached, Reply Affidavit, F. K. Dent, Stipulation (re Setting Hearing), Second Affidavit in Opposition to Injunction Pendente Lite, Opinion, Order Denying Injunction Pendente Lite, Notice of Appeal, Petition for Appeal, Assignment of Errors, Order Allowing Appeal and Fixing Cost Bond, Cost Bond on Appeal, Stipulation re Printing of Record and Praecipe in the Case of F. K. Dent, Plaintiff, vs. Alaska Placers Company, a Domestic Corporation, Defendant, No. 3781 Civil, this Court, and of the whole thereof, as appears from the Records and Files in my Office at Nome, Alaska, and I further certify that the Orig-

inal Citation on Appeal Is Annexed to This Transcript.

Cost of Transcript \$29.20 paid by Chas. J. Clasby of Attorneys for plaintiff F. K. Dent.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 19th day of October, 1948.

[Seal)     /s/ NORVIN W. LEWIS,  
Clerk, U. S. District Court, Territory of Alaska,  
Second Division. [72]

[Title of District Court and Cause.]

#### CITATION OF APPEAL

To: The Defendant above named, Alaska Placer Company, a Domestic Corporation, and to C. C. Tanner, its Attorney.

You are hereby cited to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, within forty (40) days from the date of this Citation, pursuant to an order allowing an appeal, made and entered in the above entitled cause on this day, in which the above named Plaintiff, F. K. Dent, Plaintiff and Appellant, and the Alaska Placer Company, a Domestic Corporation, Defendant and Appellee, to show cause, if any there be, why the Order made and entered in said cause on the 7th day of September, 1948, denying the application of Plaintiff for the entry therein of an Injunction Pendente Lite to restrain the Defendant from the mining and ex-

tracting of gold and other metals from the mining claims of the Plaintiff described in the Complaint therein on file, should not be set aside and reversed, and why speedy justice should not be done to said Plaintiff and Appellant above named in that behalf.

Witness the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States of America, on this 13th day of Oct., 1948.

/s/ (Illegible.)

District Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 13, 1948. [73]

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[Endorsed]: No. 12069. United States Court of Appeals for the Ninth Circuit. F. K. Dent, Appellant, vs. Alaska Placer Company, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Second Division.

Filed October 22, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 12069

F. K. DENT,

Appellant,

vs.

ALASKA PLACER COMPANY, a Domestic Corporation,

Appellee.

APPELLANT'S STATEMENT OF POINT TO  
BE RELIED ON AND DESIGNATION OF  
PARTS OF RECORD TO BE PRINTED

Comes now the appellant, F. K. Dent, and submits herewith the statement of the point on which he intends to rely on the appeal and designates the parts of the record which he thinks necessary for the consideration thereof, as follows:

I.

The point upon which appellant intends to rely on appeal is:

The district court erred in denying appellant's application for the issuance of an interlocutory order restraining and enjoining appellee, during the pendency of this action, from the mining and extraction of gold and other metals from the mining claims of appellant described in the complaint of appellant on file in the above-entitled cause.

## II.

The parts of the record which appellant thinks necessary for the consideration of this appeal are as follows and the following portions of the record are hereby designated by the appellant as being the only parts which need be printed for the purposes of this appeal:

Print the entire record, excluding Exhibits 1, 2, 3 and 4 attached to appellee's affidavit in opposition to the injunction pendente lite. In lieu of said exhibits attach to said affidavit a memorandum stating that the exhibits referred to in said affidavit are identical with those attached to the answer and printed as a part of said answer.

Dated this 17th day of November, 1948.

/s/ CHARLES J. CLASBY,  
/s/ SOUTHALL R. PFUND,  
Attorneys for Appellant.

Of Counsel:

/s/ COLLINS & CLASBY  
/s/ PILLSBURY, MADISON &  
SUTRO,  
/s/ ALLAN R. MOLTZEN.

[Endorsed]: Filed Nov. 17, 1948. Paul P. O'Brien, Clerk.

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[Title of U. S. Courts of Appeals and Cause]

STIPULATION RE PRINTING EXHIBITS  
IN RECORD

Whereas, attached to the Answer of Appellee on file in the above case are several exhibits; and

Whereas, attached to the Affidavit in opposition to Injunction Pendente Lite filed by Appellee in the above case are identical copies of the same exhibits attached to the answer; and

Whereas, it is the desire of the parties to provide for the printing only one set of said exhibits for Transcript of the record on appeal, Now, Therefore,

It is hereby stipulated and agreed by and between the Appellant and Appellee, through their respective attorneys, that in printing the record on appeal in the above noted cause now pending before the United Circuit Court of Appeals for the Ninth Circuit only the exhibits attached to the answer be printed and that in lieu of printing said exhibits again with reference to the Affidavit in opposition to Injunction Pendente Lite that there be attached to said affidavit a memorandum by the Clerk of the United States Circuit of Appeals for the Ninth Circuit stating that the Exhibits referred to in said affidavit are identical with those attached to the Answer and by reference made a part of the affidavit.

Dated this 25th day of October, 1948.

SOUTHALL R. PFUND,  
COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY,  
Attorneys for Appellant.

/s/ C. C. TANNER,  
Attorney for Appellee.

[Endorsed]: Filed November 18, 1948. Paul P. O'Brien, Clerk.





No. 12,069

IN THE  
United States Court of Appeals  
For the Ninth Circuit

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F. K. DENT,

vs.

ALASKA PLACER COMPANY,

*Appellant,*

*Appellee.*

BRIEF FOR APPELLANT.

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COLLINS & CLASBY,

CHARLES J. CLASBY,

Box 1368, Fairbanks, Alaska,

*Attorneys for Appellant.*

FILED

MAR 29 1949

PAUL P. O'BRIEN,  
CLERK



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No. 12,069

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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F. K. DENT,

VS.

ALASKA PLACER COMPANY,

*Appellant,*

*Appellee.*

### BRIEF FOR APPELLANT.

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F. K. Dent, owner of placer mining locations held for a great many years, embracing, in part, the bed of the Nuikluk River, a navigable stream situate in the Second Judicial Division, Territory of Alaska, is seeking to eject defendant therefrom and recover damages. The defendant, since the passage of the Act of Congress of August 8, 1947, Public No. 383, 40th Congress (48 U.S.C. 381), has mined and extracted gold from the bed of said stream within the end lines of plaintiff's claims, and intends to continue so to do, without asserting any claim to possession. Plaintiff sought in this proceeding an injunction *pendente lite*. The denial of the application for the injunction *pendente lite* is the basis of this appeal.

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(Note) : Appellant was plaintiff below ; appellee defendant. All emphasis in this brief is ours.

## JURISDICTIONAL STATEMENT.

The District Court for the Territory of Alaska is a Court of general jurisdiction (Sec. 1091, C.L.A. '33, 1949 Code Sec. 53-1-1) in Civil, Criminal, equity and admiralty causes. The Circuit Court of Appeals (Ninth Circuit) has appellate jurisdiction to review by appeal the interlocutory orders of the District court of Alaska. (28 U.S.C. 225, 227.)

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## STATEMENT OF ISSUE.

The issue raised by this appeal is one of law, rather than fact, and involves the application of the Act of Congress of August 8, 1947. If this Act grants to plaintiff the temporary possession of the bed of the Nuikluk River by virtue of his mining locations then the injunction *pendente lite* should have been granted. Defendant contends, and the lower Court in its decision found (Tr. 56-65) that this Act of Congress did not grant such rights to plaintiff. The act of August 8, 1947, is as follows:

“To amend section 26, title I, chapter I, of the Act entitled ‘An Act making further provision for a civil government for Alaska, and for other purposes,’ approved June 6, 1900 (31 Stat. 321), as amended by the Act of May 31, 1938 (52 Stat. 588).

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 26, title I, chapter I, of the Act entitled ‘An Act making further provision for a civil government for



Alaska, and for other purposes,' approved June 6, 1900 (31 Stat. 321), as amended by the Act of May 31, 1938 (52 Stat. 588), is further amended to read as follows:

“ ‘Sec. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the Territory of Alaska: Provided, That, *subject ONLY* to the laws enacted by Congress for the protection and preservation of the *navigable waters* of the United States, and to the laws for the *protection of fisheries*, and SUBJECT ALSO to such general rules and regulations as the Secretary of the Interior may prescribe for the *preservation of order* and the prevention of *injury to the fisheries*, all land below the line of ordinary high tide on tidal waters and all land below the line of ordinary high-water mark on non-tidal water navigable in fact, within the jurisdiction of the United States, *shall be subject to exploration and mining for gold and other* precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, *under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession* thereof for exploration and mining purposes until otherwise provided by law: Provided Further, That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the Secretary of the Interior authorizing any person or persons, corporation, or company to excavate or mine under any of said waters, and if such exclusive permit has been

granted it is hereby revoked and declared null and void. The rules and regulations prescribed by the Secretary of the Interior under this section shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumpings would actually obstruct navigation or impair the fisheries, and the reservation of a roadway sixty feet wide under the tenth section of the Act of May 14, 1898, entitled "An Act extending the homestead laws and providing for right-of-way for railroads in the District of Alaska, and for other purposes," shall not apply to mineral lands or town sites. No person shall acquire by virtue of this section any title to any land below the line of ordinary high tide or the line of ordinary high-water mark, as the case may be, of the waters described in this section. Any rights or privileges acquired hereunder with respect to mining operations in land title, to which is transferred to a future State upon its admission to the Union and which is situated within its boundaries, shall be terminable by such State, and the said mining operations shall be subject to the laws of such State.'

"Sec. 2. Nothing in this Act shall be deemed to affect or impair any valid claims, rights or privileges including possessory claims under the first proviso of section 8 of the Act of May 17, 1884 (23 Stat. 26), arising under any other provision of law.

"Approved August 8, 1947. (18)"

It has been the historical policy of the United States to reserve the shore lands and the beds of navi-

gable waters in Territories for the future state to be carved therefrom. This policy is, however, Congressional, and subject to change. (48 U.S.C. 411.)

The first relaxation of this policy came *after* the discovery, and mining, of valuable beach placer deposits at Nome. By the Act of Congress of June 6, 1900 (31 Stat. 329) the shore of the Bering Sea was open to *temporary possession* and mining under *miners' rules*.

Due to the pressure of mining interests near Juneau and near Cordova, where valuable beach deposits were known, Congress, by the Act of May 31, 1938 (52 Stat. 588) extended the same privilege of *possession* and mining, under *miners' rules*, to the rest of the tidal waters of the Territory of Alaska. (Both of these Acts, and the Act of August 8, 1947 are codified as 48 U.S.C. 381.)

At this point it is noted that in each act the area described

“\* \* \* shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, *under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law* \* \* \*”

In the Act of June 6, 1900 only the area between low and mean high tide was subject to rules of temporary

possession by miners, the shoal lands being left to control by the Secretary of War, subject to no exclusive permit being granted. When the Act was amended in 1938 to extend mining from the Bering Sea to all Alaska tidal lands the miners' rules governing temporary possession were extended to cover shoal lands, and the power of the Secretary of War relating to lands below high tide were transferred to the Secretary of Interior as applicable to preserving order and protecting commerce. In extending the effect of this Act to non-tidal waters in 1947 Congress added only appropriate protective measures to preserve fisheries.

---

### STATEMENT OF FACTS.

The facts involved in this proceeding are largely non-controversial, and are sufficiently clear and uncontroverted in the record to form a firm factual foundation for the issuance of an injunction *pendente lite*; those important to a determination of this appeal are:

1. The mining claims of plaintiff involved in this proceeding were stakes by the predecessors of plaintiff in 1933, 1936 and 1938 (Tr. 9); and constituted relocations of valuable mineral deposits known and worked at since 1899. These claims all lie across the Nuikluk River, extending from its confluence with Melsing Creek downstream. (Complaint, Tr. 2-5.)

2. For several years prior to August of 1941, the principal stockholders of defendant, then doing business under the same name as a limited partnership, held leases on the upper claims involved in this action, as well as on a great block of ground immediately upstream from Melsing Creek; then commenced to mine the upper claim but were stopped by government in *U.S.A. v. Lucas, et al.* (Tr. 20-23.)

3. Upon the leases being abandoned the claims reverted to the owners, and were from divers owners and at divers times between 1942 and 1947 purchased by the plaintiff. (Tr. 38, 49 and 50.) Other claims lower downstream and not presently involved were staked by plaintiff during the same years.

4. That after purchasing said claims plaintiff held them adversely to all, except the United States, doing thereon the required annual labor or filing proper claim of exemption therefrom. (Tr. 58, and Complaint.)

5. That said mining claims were staked, marked out, located, held and locations thereof recorded in full and complete compliance with all the Federal and Territorial laws *relative* to initiating and protecting a placer mineral entry on the *public domain open to mineral* location.

6. On February 11, 1946 plaintiff secured a War Department permit to mine the bed of the

Nuikluk River within the end line of these claims. (Tr. 53.)

7. On August 8, 1947, Congress *opened* the beds of navigable streams of *temporary possession only* for the purpose of prospecting and mining under such reasonable rules and regulations as the miners in organized mining districts have heretofore made or may hereafter make \* \* \* Plaintiff was then in possession of and thereafter remained in possession of the bed of said stream within the end lines of said claims, until,

8. Ousted by the defendant's entry thereon about September 15, 1947, with dredge; which ouster, and exhaustion of plaintiff's estate by extraction of minerals, defendant has since maintained.

9. On September 23, 1947, plaintiff notified defendant of the trespass (Tr. 52) and also of his pending application with the Department of Interior for a permit to mine. (Tr. 54.)

10. On October 21, 1947 defendant secured a permit to mine from the War Department. (Tr. 39.)

11. *On November 26, 1947* the Secretary of Interior issued regulations pursuant to the Act. (Tr. 37.)

12. The record does not disclose any claim by defendant to any right of temporary possession;

or that defendant has ever filed any notice of intent to mine as required by the regulations of the Secretary of Interior.

---

### ARGUMENT.

The mining industry in Alaska is largely placer, and such deposits usually occur in the beds of existing streams. The early years of this Territory brought an avalanche of litigation, finally settling most questions of title to mineral lands.

With expansion of mining methods, and the raise in the price of gold, marginal deposits, often in rivers navigable in fact, became economic to mine. A good many of such properties were developed, held and mined under mineral locations. Such was the situation on the Nuikluk River when a local controversy opened into complaints to the departments of Interior and Justice, resulting in the injunction suit. (Tr. 20.) That proceeding, coupled with the decision of the Supreme Court in case of *U. S. v. Appalachian Power Company* (1940), 31 U.S. 377, threw many mining "titles" in Alaska into question. By "titles" I mean those possessory rights initiated by mineral locations as distinguished from patents. However, the "question" could only be raised by the United States, *not by adverse claimants*, and administratively the government took a paternal attitude toward mining. But the importance of this one instance can be seen in Senate Joint Memorial No. 7 of the Alaska Legisla-

ture in 1941 (Session Laws of Alaska, 1941, pp. 207, 208) set forth as Appendix I.

While there was sympathy for the claim owners on the Nuikluk River arising from their *mining having been enjoined*, it is readily apparent that the rest of the miners had good reason to fear that under the same rule the government might successfully contend the creek they were *on to be navigable*, and seek to recover from *all of the gold they had already extracted*, as well as enjoin further operations. As the United States Attorney that handled the injunction proceeding (Tr. 20) in 1941 I can attest the fact that this fear was not unfounded.

Consequently the mining industry, with the largest push from those operators mining in streams apt to be called navigable, petitioned Congress for relief from this fear in the form of rights to the temporary possession of and to mine non-tidal navigable waters. Congress granted that relief. Fear of interference by the United States was laid to rest. But, *claims were jumped*; and a new fear arose! What protection was afforded existing "claims to possession" under long standing mineral locations under the Act?

According to the lower Court in its opinion, if the stream be navigable:

a. No person, by virtue of an existing mineral location, has any possessory right to the bed of the stream, or the minerals therein.

b. The organization of districts by miners has been abolished by creation of statutory dis-



tricts, and miners no longer have authority to by rule regulate temporary possession of mineral deposits even under the Act; and

c. Anyone, by filing a notice of intent to mine, can now mine the bed of any navigable stream in Alaska, regardless of possession.

In simple language the Court's interpretation of the statute means than any person at any time can go onto any portion of the bed of any stream in Alaska, and, *contending the stream to be navigable*, start to mine! The only rule is that if there be a dredge on the stream, then, if the interloper mine by dredge, he must *start* 200 feet from the dredge! There is nothing to prevent me from extracting gold with a drag line from the bed of a stream 10 feet in front of a going dredge operation on ground often developed at a cost of hundreds of thousands of dollars, *contending the stream to be navibagle!*

The Act of August 8, 1947 specifies non-tidal waters "navigable in fact" as being open to mining. (Tr. 24.) A study of the interpretation and application of that phrase in recent cases will reveal the questionable nature of every mining title on a stream in an undeveloped area such as Alaska. The import of this decision on vested title is in that regard far reaching. Not only is every dredge present evidence of the navigability of the stream in which it operates, but the *bed* of any stream that may have been used by natives, trappers or prospectors, however meager the use, *may be classified as navigable in fact*. More sig-

nificant is the Congressional rule (Federal Power Act, as amended, 49 Stats. 838, 16 U.S.C. 796) defining "Navigable Waters" including shoals, falls, and rapids, where the *stream may be made navigable* by improvements, which rule was affirmed by the Supreme Court in *U. S. v. Appalachian Power Company* (Dec. 16, 1940.) (Supra.) Heretofore, the matter was of no immediate consequence for only the United States could raise the question of navigability, and the only likely result would be the cessation of mining. Now, however, the beds of all streams *that may be proved navigable in a proceeding between citizens* are open to claims of right. Every miner in Alaska who has proven his mining claims, and is mining, or expecting to mine, can look forward to an interloper sitting in the bed of his stream, contending it to be navigable.

It is felt that Congress knew of this and intended that the Act of August 8, 1948 confirm and settle titles, rather than disrupt them. Just as they opened the beach at Nome on June 6, 1900 with knowledge of mining by custom, and the beach of all Alaska on May 31, 1938 with knowledge of mining by custom, under claims (*Thompson v. Pelton*, 4 Alaska 510; *Revenue Mining Company v. Balderson*, 2 Alaska 363) with no intent to disturb titles, so much Congress have likewise intended the effect of the Act of August 8, 1947.

In discussing the Act of August 8, 1947, we take the position that the expression " \* \* \* governing the temporary possession thereof \* \* \*" means the "tem-

porary *exclusive* possession.” If it were otherwise the right of temporary possession would be meaningless.

In our opinion the temporary right to the exclusive possession of the bed of the Nuikluk River within the end lines of the mining locations of plaintiff can be factually founded on two interpretations of the Act of August 8, 1947:

First. Congress intended to grant the right to mine to all persons presently in possession under *any existing* reasonable rules governing temporary possession of mineral deposits; and

Second. Congress intended the right of temporary possession of the beds of navigable streams to be treated separately from general mining laws, and governed solely by local miners’ rules.

---

**FIRST. CONGRESS INTENDED TO GRANT THE RIGHT TO MINE TO ALL PERSONS PRESENTLY IN POSSESSION UNDER ANY EXISTING REASONABLE RULES GOVERNING TEMPORARY POSSESSION OF MINERAL DEPOSITS.**

It must be recognized that the mining laws, local and Federal, have been and are largely used to initiate and maintain temporary possessory rights. Vast areas are “staked, prospected, and dropped” only to have the process repeated as the price of gold or mining methods bring profitable mining thereof closer. Nearly all the small operators, and a number of the larger operators actually develop and mine to exhaustion their claims without proceeding to patent. As a prac-

tical matter, undoubtedly well known to Congress, the laws relating to mineral locations are laws largely governing the "temporary possession" of mineral deposits. The general mining laws of the United States (30 U.S.C. 28, et seq.) have been extended to Alaska. In them is left to the States, Territories, and "miners of each miner's district" the right to adopt rules

"\* \* \* governing the location, manner of recording, amount of work necessary *to hold possession of a mining claim* \* \* \*" (30 U.S.C. 28).

Also 30 U.S.C. 22 provides:

"Except as otherwise provided all valuable mineral deposits *in lands belonging to the United States*, both surveyed and unsurveyed, are hereby declared to be *free and open to exploration* and purchase, and the lands in which they are found *to occupation* and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, *and according to local customs or rules of miners in the several mining districts* \* \* \*"

"local custom" and "rules of miners" have been largely superseded by legislation in the several states as well as the Territory of Alaska. This thought is expressed by Lindley in his Volume 1 on Mines (3rd Ed.) at page 117:

"In Alaska, which until the passage of the Act of August 24, 1912, had no legislative branch of government, one would naturally expect to find elaborate and comprehensive codes supplementing

Federal legislation. Such was the case in the earliest days of mining activity in that region, but these local codes have, as we understand the situation, gradually fallen in disuse, and in many localities where they once flourished they are practically ignored."

Congress in 1900 knew that "rules by miners" under the general mining laws were in use in Alaska, and that the beach at Nome was being mined; and confirmed those acts "under miners' rules heretofore made." No legislature was created for Alaska until 1912. Congress reviews all laws of Alaska, and has therefore actual knowledge of the Territorial mining laws. (Organic Act, Sec. 20, 37 Stat. 512.) In 1938 and again in 1947 in re-enacting and extending 48 U.S.C. 381 Congress knew that legislative acts had totally superseded miners' rules, and was aware of the legislation. Also in 1947 Congress was aware of three other factors:

A. That *prior* to 1938 it was the custom to "claim" possession for mining purposes on tide lands in the same manner as uplands.

B. That the use of the language "miners' rules" in the 1938 act had not raised any litigation concerning its meaning; and

C. That mining "claims" under "existing laws governing mineral locations" had been held for many years on the Nuikluk and other streams in Alaska. (L. of Alaska, 1941, p. 207 and Appendix I.)

All of which lead to the inescapable conclusion that Congress re-used the words "rules and regulations miners \* \* \* may have heretofore made \* \* \*" as *conservative mining nomenclature* of Federal Acts that had served and would serve the purpose of protecting *claims to rights initiated prior to the act under local rules, custom and/or legislation*. It is only consistent to read the statute in the plain light of known practices it was the design of the statute to condone; and to construe that language to include *custom and legislative acts* heretofore existing.

This position is borne out by the Congressional proceedings relating to enactment of the Act.

This Act, exclusive of Section 2, was passed by the House on June 2, 1947 (Congressional Record, House, P. 6334), as H.R. 174. With the bill was Report No. 309, 80th Congress, by Mr. Welch of the Committee on Public Lands. In explanation of the bill Mr. Welch had this to say:

"The purpose of this bill is to make possible exploration for and mining of gold and other precious metals in the beds of navigable streams in Alaska. Such exploration and mining are not permissible under existing law.

"A recent Supreme Court decision in the case of the United States v. the Appalachian Power Company (85 Law. Ed., p. 243) (311 U.S. 376), held in effect that any stream is navigable which can be made so. Prior to this decision placer mining was carried on in the beds of streams which are not, in fact, navigable except during high water periods in the spring.

“This bill would remedy the existing situation by extending the right to mine that now exists in bays, shores, and inlets, to navigable streams, subject to the jurisdiction of the War Department for the protection of navigation and the jurisdiction of the Interior Department for the protection of fisheries. Contained in this bill are safeguards aiding the Fish and Wildlife Service of the Interior Department to keep a constant check upon mining to make certain that the fish are not endangered.”

The report sets out a letter from the Secretary of the Interior. The Secretary concerned himself only with the protection of navigation, and fisheries, excepting for the following statement:

“Finally, the bill would continue in effect a confusing and meaningless distinction in the text of the existing law between mining operations carried on in the area between low and high tide and those carried on in the area below low tide, and would seemingly extend this distinction without a difference to the non-tidal navigable waters which it would open to mining operations. A rearrangement of the provisions of the bill that would give them uniform application in form, as well as in substance, to all types of navigable waters would be of material assistance in their administration.”

In passing the Act the entire House discussion is as follows:

The Speaker. Is there objection to the present consideration of the bill?

Mr. Cole of New York. Mr. Speaker, reserving the right to object, I would like to ask some questions of the Delegate from Alaska. Under existing law, it is illegal for the exploration of gold in navigable waters of the American Territories. This bill makes possible the exploration of gold mining in the rivers of Alaska. Heretofore it has been the policy of the Government to reserve the mineral rights of the Territories for the benefit of that Territory, if and when it should become a State. This bill reserves the right to the Territory of Alaska, if and when it becomes a State, to cancel the authority granted under this bill. I should like to inquire of the Delegate if the present government of the Territory of Alaska has expressed its attitude concerning the bill.

Mr. Bartlett. Mr. Speaker, in reply to the gentleman from New York (Mr. Cole) I should like to say that the fifteenth session of the Territorial legislature in 1941 adopted a memorial addressed to the Congress asking that legislation be passed with respect to specific situations regarding the Nuikluk River on the Seward Peninsula. Since then it has seemed advisable to extend the authority of the bill because I am informed that a decision of the Supreme Court was to the effect that any stream susceptible of being improved to the point of navigation could be deemed to be navigable. If that were literally construed in Alaska substantially all the gold-mining industry would have to suspend. It is our second largest industry.



Mr. Bartlett continued:

I should like to say further that the authority of the War Department under the present law and regulations is not diminished by reason of any provision of this bill.

I refrained from introducing it for considerable time so that I might be satisfied that adequate provision should be made for the protection of the salmon running in this river and other rivers that might be protected. I now believe the language of the bill will accomplish that purpose and that mining can be carried on and the fish will not be endangered. The Secretary of the Interior has adequate authority, though the Fish and Wildlife Service, to compel the suspension of mining operations if the fish runs are interefered with.

Mr. Cole of New York. The gentleman has not yet answered the question which I have raised. The gentleman pointed out that the Territorial legislature in 1941 did memorialize Congress to make mining possible as to a particular stream. That is quite a different proposition from the one we have before us today which grants blanket authority for mining operations in all streams. I think it is very important that the Congress have some official expression from the Territorial government that that government favors this bill, because it is conceivable that even though the Territory, once it becomes a State, may have the right to cancel the privileges conferred by this bill, when that right is exercised by the State, a sizable claim for money damages might be due from the State to an individual. So I suggest that if the gentleman has not had official word from the Territorial government as to this bill that we

here in Congress should have that word before the bill is passed.

Mr. Bartlett. I should like to say to the gentleman from New York that the Territorial legislature will not be in session again for two years. If there were literal construction of the Supreme Court decision it might have the effect of suspending practically all gold-mining operations in the Territory at this time, which, of course, would be a calamity.

Mr. Cole of New York. Of course, it is not my desire to delay the passage of the bill. I wonder if the gentleman cannot, on his own authority, as Delegate and representative of the Territory of Alaska, assure the Congress that his constituency favors this bill.

Mr. Bartlett. I should say that the Territorial government would absolutely favor this bill so long as adequate provisions are made to protect any fish which might be in any of those streams. Those provisions are contained in the bill. I have no doubt if the legislature were in session tomorrow it would approve this bill.

Mr. Cole of New York. Mr. Speaker, I withdraw my reservation of objection.

The Senate Report on this bill (Mr. Dworshak, Public Lands, Calendar No. 265, Report No. 258, 80th Congress) contains the identical language of the House Report (above); and again contained a primary interest in the protection of fisheries and navigation.

The Senate passed this bill, with an amendment, on July 24, 1947 (Congressional Record—Senate, P. 10002) the proceedings relating thereto being:

The bill (H.R. 174) to amend section 26, title I, chapter I, of the act entitled "An act making further provision for a civil government for Alaska," and for other purposes, was announced as next in order.

Mr. O'Mahoney. Mr. President, this is the measure which I thought was under consideration when I sent an amendment to the desk a few moments ago.\*

The President pro tempore. Is there any objection to the consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

Mr. Knowland. Mr. President, I take it from the remarks which have been made that this bill relates only to Alaska?

Mr. O'Mahoney. That is correct.

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\*The Senator referred to the following proceedings relating to the previous bill (P. 10001):

Mr. Butler. The bill does not affect at all the question of title to tidelands or submerged lands.

Mr. Johnson of Colorado. It affects them in no possible way in any State?

Mr. Butler. That is correct. That is stated in the report accompanying the bill.

Mr. O'Mahoney. Mr. President, I rather think there is some error in that statement. After this bill passed the House there was a decision of the Supreme Court which changed the considerations involved in this bill. I have consulted the Senator from Idaho (Mr. Dworshak) and the Delegate from Alaska (Mr. Bartlett); and, at the request of the Department of the Interior, I offer the amendment which I send to the desk and ask to have stated.

Mr. Butler. Mr. President, may I inquire if the Senator is referring to order No. 265, House bill 174?

Mr. O'Mahoney. Yes.

Mr. Butler. The Senate is considering order No. 162, Senate bill 1081.

Mr. O'Mahoney. I am sorry. I was told that order No. 265, House bill 174, was being considered, I withdraw the amendment.

Mr. Knowland. It has no effect in any State now existing?

Mr. O'Mahoney. It has no effect on any State. I now offer the amendment which inadvertently I suggested in connection with the previous bill.

The President pro tempore. The amendment offered by the Senator from Wyoming will be stated.

The Chief Clerk. At the appropriate place in the bill it is proposed to insert the following:

Any rights or privileges acquired hereunder with respect to mining operations in land, title to which is transferred to a future State upon its admission to the Union and which is situated within its boundaries, shall be terminable by said State, and the said mining operations shall be subject to the laws of such State.

Sec. 2. Nothing in this act shall be deemed to affect or to impair any valid claims, rights, or privileges, including possessory claims, under the first proviso of section 8 of the Act of May 17, 1884 (23 Stat. 26) arising under any other provision of law.

The President pro tempore. The question is on agreeing to the amendment offered by the Senator from Wyoming.

The amendment was agreed to.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill was read the third time and passed.

The amended bill was passed by the House without objection, or comment, on July 25, 1947. (Congressional, House, P. 20388.)

The case referred to by Senator O'Mahoney could only be the case of *U. S. v. California*, 332 U.S. 19.

It is therefore concluded that Congress did not intend to upset practices in effect, and intended to confirm existing claims. The existing claims of plaintiff (and others) were based on the statutes, as distinguished from miners' rules, and the record reveals that the method and manner of staking and holding the mineral locations by plaintiff and his predecessors is not questioned.

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**SECOND. CONGRESS INTENDED THE RIGHT OF TEMPORARY POSSESSION OF THE BEDS OF NAVIGABLE STREAMS TO BE TREATED SEPARATELY FROM GENERAL MINING LAWS, AND GOVERNED SOLELY BY MINERS' RULES.**

This proposition is equally as sound as that stated in the foregoing portion of this brief. Congress in passing the Act of June 6, 1900 (48 U.S.C. 381 in original form) extended the mining laws of the United States to Alaska. This included 30 U.S.C. 28 vesting regulatory powers in miners. To have continued on in that act vesting rule powers in "miners in organized mining districts" to govern temporary possession rights on tidal lands is inconsistent with treating possessory rights in such lands in the same class as other placers, and is consistent with vesting solely in such miners regulatory powers over temporary possessory rights on tidal lands.

To have repeated this identical vesting of power in miners in organized districts in the 1938 Act, covering tidal and shoal lands of all of Alaska, in the face

*of adequate covering by statutes of possessory rules to upland deposits*, would indicate a clear revesting of such sole authority in local miners. The identical language is found again in the 1947 Act.

In so doing Congress was recognizing that such “temporary possessions” were not subject to general grant under the general mining laws, or are proper Territorial legislative subjects, but had been the subject of purely local rule and custom; *and should remain so*, with specific affirmation of all *such rules heretofore made*.

The lower Court seemed to feel that miners in organized mining districts no longer have rule making power. (Tr. 60-61.) With this we cannot agree. The general mining laws use the phrase “the miners of each mining district \* \* \*”; and those applicable specifically to Alaska (48 U.S.C. 381, and 383) use the phrase “\* \* \* miners in organized mining districts \* \* \*” We can see no real difference, for there can hardly be a “district” without some organization, however loose.

48 U.S.C. 383 grants miners in *organized districts* certain additional powers, *and* the right to name a recorder if the district is not within one designated by the Court. And, with the repeated statement in reenacting 48 U.S.C. 381 it can hardly be said that miners have no rule making power. *Betsch v. Umphrey* (9th Cir. 1921), 270 Fed. 45.

Largely the “rules and regulations” of miners are not the written result of parliamentary meetings since

in great measure the statutory regulations are adequate, but consist in custom and usage. Such "custom" is evidenced by expression of the Court in the following cases:

*Peca v. Huddleston*, 5 Alaska, 241;

*McFarland v. Alaska Preseverance Mining Co.*,  
3 Alaska 308, 311, 331, 336;

*Alaska Gold Recovery v. Northern Mine and Trading Company*, 7 Alaska, 386, 391, 395.

See also:

*Atchison v. Peterson*, 87 U.S. 507, 510, 512.

The record in this case contains ample evidence of the "custom" as it related to the Nuikluk River, it being clear that local miners appropriated the bed thereof, and held it, in the same manner and according to the same rules of law as relate to mineral locations generally. (*Session Laws of Alaska*, 1941, p. 207: Appendix I.) This is true throughout Alaska. Such common custom does not need the expression of a "miners' meeting".

However, the record reveals that a miner's meeting was called. (Tr. 44-46, 54-55.) Also, that the defendant had notice and was present. The defendant (Tr. 55) and the lower Court (Tr. 60-61) attempts to belittle the meeting. It is true the meeting was of the old Council Recording Precinct miners, not the present Cape Nome Precinct. The Cape Nome Precinct has throughout late years, absorbed and consolidated a great many old recording precincts, no longer needed as separate districts, to facilitate ad-

ministration resulting in a present large area unrelated to local mining problems. This problem is local; it was dealt with by miners concerned with or affected by the problem on the Nuikluk and Solomon Rivers. It is to be noted that neither defendant nor the lower Court claimed that the meeting was not properly organized or that those in attendance did not *constitute all the actual miners in the area of the Nuikluk River* affected by the problem of claims on navigable streams. Nor do either the defendant or the lower Court take issue with the regulations adopted as being unreasonable or contrary to the laws of the United States. The rules adopted did nothing more than accord recognition to long existing custom. The rules adopted were:

**Rule 1.** Owner, or owners, of valid placer locations embracing within its boundaries any portion of the bed of a navigable stream shall have the exclusive right to prospect and mine said portion of the bed of a navigable stream so long as such valid mining locations are maintained in effect under the laws of the United States, or the Territory of Alaska.

**Rule 2.** The owner, or owners, of valid placer mining locations abutting ordinary high water on the banks of navigable rivers shall have the exclusive right to prospect and mine the beds of navigable streams abutting such placer mining locations from mean high water to the center or thread of the stream at summer low water so long as such mining locations remain in effect under the laws of the United States, or the Territory of Alaska.



Rule 3. The rights of exclusive possession for the purpose of prospecting and mining in these rules and regulations provided are for the temporary use of the beds of navigable streams, shall not confer any property right, and apply with equal force and effect to all valid mining locations heretofore made, and all those hereafter made. The application of these rules is by this meeting limited to the Nuikluk River in the District of the Seward Peninsula.

It is to be noted that there were *no negative votes in the rules* (Tr. 46) even by Mr. Loman and his two crewmen.

These rules adequately establish the legal right of the plaintiff to the lands withheld by the defendant.

In denying the temporary restraining order the lower Court said:

A reading of the Act will disclose that it was the intent of Congress to provide *no exclusive right to the lands under navigable waters*. The conditions under which mining for gold or other precious metals may be taken apply to all citizens and those who have legally declared their intention to become such, subject, however, to the laws enacted by Congress for the protection and preservation of navigable waters, the fisheries, and under rules and regulations of order and the prevention of injuries to the fisheries.

This view of the Act is plainly error, for Congress specified rights of temporary possession could be acquired.

Stress is laid by defendant and the lower Court on the fact that prior to August 8, 1947, plaintiff's claims carried no right to mine the bed of the stream; and that plaintiff was barred by the judgment in the *Lucas* case. (Tr. 20-22.) They overlook the "injunction" in that case:

"It Is Hereby Ordered, Adjudged and Decreed that the defendants Alaska Placers Company, a limited partnership, Joseph E. Lucas and (15) Eugene V. Lucas, and their servants and agents, be and they are hereby *barred from mining or removing in any manner, gold, precious minerals or things of value from the bed of the Nuikluk River* below the line of ordinary high water from a point on the Nuikluk River fifteen hundred (1500) feet upstream from its confluence with Melsing Creek downstream to its confluence with the Fish River, which flows into Golofnin Bay off Norton Sound, Territory of Alaska, *until such time as legal authority so to do is secured by said defendants from the sovereign owner of said herein described real property.*

The Court did not annul the claims, or declare them void; and in fact looked prospectively to an act such as that of August 8, 1947, or legislation by a future state carved from the Territory. Plaintiff in purchasing the claims come under the *bar* of that case; *but only until* " \* \* \* *legal authority (to mine) is secured from the sovereign owner* \* \* \* "

The lower Court seems to find some point in stating (Tr. 64):

“\* \* \* he has failed to show, either in his pleading or affidavits that he has complied with the rules and regulations of the Secretary of Interior \* \* \*”

but what it is I cannot understand. The rules of the Secretary require notice of “intention to mine or dredge”; but an intent to mine, or mining, is not a part of an ejectment proceeding. Such a notice cannot initiate any right of possession. Its sole object is to advise the Secretary so that he may see to it that fisheries are not thereby adversely affected. This is recognized by the defendants for they do not claim any possessory right, or even that they filed such a notice.

The lower Court felt impelled to point out that we must succeed on the strength of our own title, not the weakness of that of defendant. This probably arose through a misconception of our interest in stressing the total lack of claim to possessory right by defendant. We laid that stress as a firm *factual* basis for injunctive relief. This is no case of conflicting claims to title wherein the Court in the exercise of sound discretion might deny injunctive relief *pendente lite*; but is a case where *if any right of possession exists* it is in the plaintiff. If the law supports plaintiff's right injunctive relief must be granted. *Wasky v. McNaught* (9th Cir. 1909), 163 Fed. 929.

**CONCLUSION.**

The plaintiff by virtue of his mineral locations established and held under the laws of the Territory relating to mineral locations, has the right of possession under custom and miners' rules, to the bed of the Nuikluk River within the end lines of the claims; and the mining thereof *pendente lite* by defendant should be enjoined.

Dated, Fairbanks, Alaska,  
March 25, 1949.

Respectfully submitted,  
COLLINS & CLASBY,  
CHARLES J. CLASBY,  
*Attorneys for Appellant.*

**(Appendix Follows.)**

## **Appendix.**



## Appendix

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### SENATE JOINT MEMORIAL NO. 7

To the Congress of the United States and to the Honorable Anthony J. Dimond, Delegate to Congress for the Territory of Alaska:

Your Memorialist, the Legislature of the Territory of Alaska, in Fifteenth Regular Session assembled, respectfully submits that:

WHEREAS, the Niukluk River is a tributary of Fish River on Seward Peninsula in the Second Division of the Territory of Alaska and is North of 64° Latitude and consequently frozen during the greater part of every year; that during the lesser period of the year when it is open and running the ordinary state is for the water to be low with numerous bars and shoals; that freight is transported up the river to the community of Council which is situated on the banks of the Niukluk River about 12 miles above its point of confluence with Fish River; that for such transportation flat power scows tare used, but traffic is possible only at certain stages of the water, and auxiliary horse or tractor power on shore is required to cross bars and shoals; and,

WHEREAS, the bed of the Niukluk River, its benches, the beds of its tributaries and their benches, are in a highly mineralized zone, and have been the scene of mining operations since the early days of gold discoveries on Seward Peninsula. From the beds and benches of Ophir Creek, a tributary of Niukluk River,

several miles above Council, Alaska, some of the most phenomenal gold recoveries in Alaska's history were made; and,

WHEREAS, from the time of the first discoveries of gold in the vicinity of Council, Alaska, prospectors and miners have located and held by mineral location much of the area of the bed and benches of the Niukluk River and its tributaries, and mined many portions in the firm belief that the locations were proper, and the mining, extraction and disposition of gold therefrom legal and proper; and,

WHEREAS, in 1940 the United States Government by and through the office of the United States Attorney at Nome, Alaska, instituted an action in the District Court at Nome to restrain and prohibit any further mining and extraction of gold from the bed of the Niukluk River, from its confluence with Fish River, to a point about 12 miles upstream, that is, as far as Council, Alaska. Such action is based on the contention that this 12 mile portion of the Niukluk River is a navigable stream and is consequently not open for mineral location nor subject to mining or the extraction of gold therefrom. That as a result of the commencement of such action, or anticipating its commencement, owners and lessees of some mineral claims embracing part of the area concerned, have been required as a reasonable business practice to alter their plans for mining; other owners have had their claims mined by third parties ignoring locations; other owners have had options and agreements abandoned because of the uncertainty created, and other



litigation has been instituted in the District Court at Nome between claim owners and those ignoring their rights; and

WHEREAS, any curtailment of mining or avoidable interference with it in the vicinity of Council is to the immediate detriment of the residents of that section and of the Territory of Alaska. The single industry of the Council area is gold mining, and the residents and inhabitants are dependant upon it. The river area concerned has been under mineral location for more than 30 years, mining done thereon, and locators have expended large amounts of money and much labor in the doing and performing of annual assessment work. That no action was taken by the Government until 1940 to indicate that the rights of locators were non-existent, and their expenditures and labors futile. The shallowness of the ordinary water of the Niukluk River, the numerous sand bars, and the frozen condition of the river during the greater part of each calendar year makes it doubtful that the portion of the stream concerned is navigable in the sense intended by law.

NOW, THEREFORE, your Memorialist, the Legislature of the Territory of Alaska, respectfully urges that appropriate legislation be introduced and enacted by the Congress of the United States whereby the Nuikluk River would be declared a non-navigable stream.

AND YOUR MEMORIALIST WILL EVER PRAY.

Passed by the Senate, March 6, 1941.

Passed by the House, March 14, 1941.



IN THE  
**United States Court of Appeals**

FOR THE NINTH CIRCUIT.

---

F. K. DENT, *Appellant*,

v.

ALASKA PLACER COMPANY, *Appellee*.

---

Appeal from the United States District Court for the  
Territory of Alaska, Second Division.

---

**BRIEF FOR APPELLEE.**

---

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FILED

JULY 1949

PAUL P. O'BRIEN



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IN THE  
**United States Court of Appeals**

FOR THE NINTH CIRCUIT.

---

No. 12069.

---

F. K. DENT, *Appellant*,

v.

ALASKA PLACER COMPANY, *Appellee*.

---

**Appeal from the United States District Court for the  
Territory of Alaska, Second Division.**

---

**BRIEF FOR APPELLEE.**

---

**I.**

**JURISDICTION.**

Upon a Complaint in ejectment, and application for a temporary Restraining Order pending trial of the action, filed by Plaintiff on August 12, 1948 in the District Court for the Territory of Alaska, Second Division, and pursuant to Order to Show Cause, pleadings, affidavits, and proceedings had thereunder, the said District Court, on September 7, 1948, denied said injunction pendente lite (R. 56-66). The

said District Court had jurisdiction to deny plaintiff's application for injunction pendente lite. (48 U. S. C. 110.) 28 U. S. C. 1948 Judiciary and Judicial Procedure Sec. 1357.

Appeal was allowed within thirty days from the District Court's order denying injunction pendente lite (R. 66-70). This Court has jurisdiction to hear an appeal from this interlocutory order. (28 U. S. C. 225 (b), and 227.) 28 U. S. C. 1948 Judiciary and Judicial Procedure 1292, 1294(2).

## II.

### STATEMENT OF THE CASE.

#### Facts.

Defendant, an Alaskan corporation, obtained from the U. S. Department of the Army, Corps of Engineers, a non-exclusive permit, revocable at will, but otherwise valid to December 31, 1950 (R. 26-30), authorizing Defendant "to dredge for gold in Niukluk River," southeasterly from Council Alaska (See shaded portion of map, R. 31).

Pursuant to such permit, during the latter part of the open mining season of 1947, Defendant floated its dredge to a patented mining claim held by Defendant under lease, to wit, L. & A. Bench, U. S. M. S. 1152, and prepared, in conformity with the Act of August 8, 1947 (R. 23-6), to mine the bed of the navigable stream, Niukluk River. (See Appendix to brief.)

During all of the open mining season of 1948, Defendant operated said dredge in the bed of the Niukluk River pursuant to said Act of August 8, 1947, and in accordance with the Regulations promulgated under said Act by the Department of the Interior, Bureau of Land Management, as set forth in Circular No. 1667 (R. 33-36; see also R. 39-40).

Plaintiff was at all times fully informed of Defendant's operations, and on September 23, 1947 notified Defendant that he, too, had a permit obtained from the U. S. Department of the Army, Corps of Engineers, to dredge for gold in the Niukluk River, said permit having allegedly been issued February 11, 1946 (R. 53).

Plaintiff has at no time used said permit, nor has he dredged, or attempted to dredge, the bed of said River (R. 40), although he has the right to do so, the privileges granted by the War Department, Army Engineers, and by the Regulations of the Department of the Interior (Cir. 1667), being non-exclusive (R. 34).

Plaintiff, on August 12, 1948, filed an action in ejectment against Defendant, asking for an injunction pendente lite (R. 2-7).

Plaintiff bases his right to such injunction on his alleged ownership "in fee", and "right to exclusive possession" of certain placer mining claims, "over and across" the bed of the Niukluk River (R. 2-5; see also shaded portion of map. R. 31). Plaintiff's claims, by their description (R. 3-5), appear to lie wholly within the bed of the Niukluk River.

All these claims were staked by Plaintiff's predecessors, the earliest date given, being 1933, and the last, May, 1938 (R. 9).

Plaintiff obtained said river-bed claims by a purported warranty deed dated March 17, 1946, from Clyde Glass and Violet Glass (R. 17), having also received in 1942, a quit-claim deed from F. P. Durocher (R. 49), and others.

Prior to the alleged grant to Plaintiff, the United States of America brought an action entitled *United States v. Lucas et al.*, against certain defendants, including the said Clyde Glass, and including also this defendant, to enjoin them, and others, from mining in the bed of the Niukluk River. A judgment in said action was entered September 29, 1941, ordering that the said Glass (and others)

"... are hereby barred from mining . . . the bed of the Niukluk River below the line of ordinary high water . . . until such time as legal authority so to do is secured by said defendants from the sovereign owner of said herein described real property.

"It is Further Adjudged and Decreed that the United States of America is the holder of all right, title and interest in and to the bed of the Niukluk River . . . and that Nels Swanberg, Sr. . . ., Clyde D. Glass, and John L. Ost, as riparian owners of mineral claims do not, by virtue thereof, acquire any right,

title or interest in or to the soil or the values therein below the line of ordinary high water, it being specifically declared that the above portion of the Niukluk River is a part of the navigable waters of the Territory of Alaska." (R. 20-22; See also R. 57)

Plaintiff has at all times been fully informed of the above mentioned decree of court (R. 53), but, in disregard of it, he claims the bed of the Niukluk River below ordinary high water, "in fee" (R. 2), and claims that he is entitled to its "sole and exclusive possession" as "owner" (R. 7; 47; 52; 53), save as to the United States of America, by virtue of the "claims" staked out in said river-bed by his predecessors, Clyde Glass et al, and the transfer to Plaintiff of such title as the said Clyde Glass and others had to such claims (R. 9).

In addition to Plaintiff's alleged sole possession and ownership of the Niukluk River bed, plaintiff also rests his demand for an injunction pendente lite on the further ground that his "possessory rights" are in conformity with "Miners' Rules." (R. 44-6). These alleged rules were adopted at a meeting at Council, Alaska, on June 29, 1948 (R. 44). Plaintiff F. K. Dent, delivered an unsigned "Notice of Miners' Meeting", dated June 28, 1948, for a meeting the following day (R. 54). Mr. Clyde Glass, Defendant in the above mentioned suit by the United States of America, nominated Plaintiff as Chairman (R. 44). Nels Swanberg Jr., son of a defendant in the above mentioned suit by the United States of America, acted as Secretary (R. 46). The so-called "Rules" which were adopted had been prepared by Plaintiff's lawyers (R. 55). These rules provided that:

Rule 1. The owner "of a valid placer mining claim embracing within its boundaries any portion of the bed of a navigable stream *shall have the exclusive right* \* to prospect and mine" the bed of the stream; and

Rule 2. The owner of a placer mining location "abutting ordinary high water on the banks of navigable

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\* Wherever emphasis is used in this brief, it has been added by the writer.

*rivers shall have the exclusive right to prospect and mine the beds of navigable streams abutting such placer mining locations . . .”*

Furthermore, the rules were made both retroactive and prospective in application (R. 45).

Sixteen voters adopted the “Rules.” These included Plaintiff, his wife, Mr. Clyde D. Glass, Plaintiff’s predecessor in interest who had been ousted from ownership in, or mining the bed of the Niukluk River by the suit brought by the United States of America, Nels Swanberg Sr., another defendant, so ousted in said suit, Mr. Swanberg’s son, Nels Swanberg Jr., and F. P. Durocher, another of Plaintiff’s “predecessors in interest.” Six of those adopting the “Rules” were directly interested in the pending suit (R. 46; cf. names R. 38, 49-50). Three of those present, including Defendant’s president, refused to participate in said meeting (R. 46).

After proceedings had pursuant to an Order to Show Cause, issued by the District Court on August 12, 1948, returnable on August 25, 1948 (R. 12-13), and, upon the facts adduced at the hearing thereon on August 31, 1948 (R. 48), and upon the above facts and allegations of record, the District Court, on September 7, 1948, rendered its opinion, and entered an order denying Plaintiff’s application for an injunction pendente lite (R. 56-65).

Plaintiff appeals from said order.

### III.

#### QUESTION PRESENTED, AND SUMMARY OF ARGUMENT.

Since it is the well settled rule that an application for an interlocutory injunction is addressed to the sound discretion of the trial court, it appears to appellee that there is but *one* question actually involved in this appeal, which, stated affirmatively, is as follows:

- (1) It was not, under the facts in this record, an improvident exercise of the trial court’s discretion to refuse

Plaintiff's application for an injunction *pendente lite*.

However, since appellant, in his opening brief, argues other questions, concerning the interpretation of Federal statutes, they will be considered, and answered, herein as additional issues, as follows:

- (2) It has never been the intent of Congress, either in (a) the General Mining Laws (30 U. S. C. 21 et seq) or by (b) laws adopted for the government of the Territory of Alaska (Organic Act, Alaska, May 17, 1884, 23 Stat. 24), or in subsequent amendments thereto (Act of June 6, 1900, 31 Stat. 329, 48 U. S. C. 381; Act of August 24, 1912, 37 Stat. 512, 48 U. S. C. 21) to grant any *rights* to the beds of navigable streams and—

Since all the mining statutes provide that “rules and regulations established by the miners shall not be in conflict with the mining laws of the United States,” the miners in a mining district of Alaska have no statutory authority or power to adopt rules governing “temporary”, or any other kind of “rights to possession” of mineral deposits in the beds of navigable streams.

- (3) It was not the intent of Congress, by the Act of August 8, 1947 (61 Stat. 916, 48 U. S. C. 381) to confer either title to, or possessory rights in the beds of navigable streams in Alaska.

This Act merely opened the beds of such streams to “exploration and mining subject to such rules and regulations as the Secretary of the Interior may prescribe,” and

- (a) This last 1947 Act, like prior Acts, limited any rules and regulations which miners might make to such as are not in conflict with the mining laws, and hence

- (b) Congress did *not* intend to leave the rights of possession of beds of navigable streams in Alaska to be governed by miners' rules.
- (4) Plaintiff never acquired, nor does he now have, any valid "fee title", "possessory right", or any other property right in the bed of the Niukluk River.
- (5) Plaintiff's alleged claim of title to the minerals in the bed of the Niukluk River is not made in good faith.
- (6) The miners' meeting in 1948 and the Rules adopted were under the control of Plaintiff and added nothing to his already invalid claim to the bed of the Niukluk River.
- (7) The Trial Court properly construed the law and its denial of Plaintiff's application for an injunction pendente lite was in the exercise of a sound discretion.

#### IV.

#### ARGUMENT.

- (1) Denial of Plaintiff's application for an injunction pendente lite was not an improvident exercise of the Trial Court's discretion.

The Supreme Court of the United States has stated the principles of law under which this appeal must be considered.

In *State of Alabama and Alabama Public Service Commission, Appellants v. United States of America, Atlantic Coast Line Railroad Company, Seaboard Airline Railway Company et al* (1929), 279 U. S. 229, 73 L. Ed. 675, the court said:

"It is a well established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not

be disturbed by an Appellate Court unless the discretion was improvidently exercised. *Meccano v. John Wanamaker*, 253 U. S. 136, 141, 64 L. Ed. 822, 826, 40 Sup. Ct. Rep. 463; 2 High, Inj., 4th Ed. P. 1696. And see *Rice and A Corp. v. Lathrop*, 278 U. S. 509, ante, 480, 49 Sup. Ct. Rep. 220 (February 18, 1929). The rule generally to be applied in the exercise of that discretion, is stated in our recent decision in *Ohio Oil Co. v. Conway*, 279 U. S. 813, post. 972, 49 Sup. Ct. Rep. 256 (March 5, 1929).

The Ohio Oil Co. case was one where an injunction was sought to prevent the collection of an enlarged severance tax by the State of Louisiana pending a test of the validity of the law. The Supreme Court noted that:

“The laws of the State (Louisiana) afford no remedy whereby restitution of the money so paid may be enforced, even where the payment is under both protest and compulsion.”

and then, in vacating the order denying the injunction, stated the rule by which the Trial Court’s discretion is to be measured, as follows:

“Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be *certain and irreparable* if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by bond, the injunction usually will be granted.”

In the case of *Hannan v. City of Haverhill* (1941 CCA1), 120 F. 2d 87, the court, after reviewing authorities, quoted with approval from *New York Asbestos Mfg. Co. v. Ambler Asbestos Air-Cell Covering Co.*, 102 F. 890, 891, as follows:

“The granting of a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it; and the



decision of the court of first instance, refusing such an injunction, will not, except for very strong reasons, be reversed by this court.”

and then applied the rule laid down by the Supreme Court, (p. 90) :

“In rare cases, an Appellate Court will reverse the Trial Court for refusal to issue an interlocutory injunction, as in *Ohio Oil Co. v. Conway*, 279 U. S. 813, 49 S. Ct. 256, 73 L. Ed. 972. In that case, if the collection of a tax of doubtful constitutionality were not restrained pendente lite, the injury to the moving party would be certain and irreparable though final decree should go in his favor, because the laws of the State afforded no remedy for restitution of tax moneys illegally collected. No such extreme case is presented here. On the record before us we cannot say that the district judge abused his discretion in denying an interlocutory injunction. The plaintiffs have never applied for a special permit and been refused; nor have they shown that such an application would be a futile gesture. Therefore it cannot be said that denial of an interlocutory injunction will work irreparable injury to the plaintiffs . . .”

So is it likewise true that no extreme case is presented here. Appellant has allegedly had a permit to float a dredge in the Niukluk River since 1946 (R. 53); he was well aware of the passage of the law of August 8, 1947 opening the bed of the Niukluk, and other navigable streams to mining, and aware also of the Regulations promulgated pursuant thereto on November 26, 1947, which required a notice of intention to mine, but which like the law, granted no exclusive right of possession to any one in the beds of such streams. He has had, and still has, the same rights under the Act of August 8, 1947 as Defendant, but he has not complied with the law and regulations. He refuses to conduct mining operations in the bed of the Niukluk River as a privilege, along with others. Instead, failing himself to mine within the terms of the law, he seeks to enjoin Defendant, who is dredging in conformity with law and regulations.

An injunction pendente lite is not a power of the court that he can invoke in such a case. He may not use it to assist him in holding others off of the bed of a navigable river, to which he has no valid claim, and to which he can obtain no patent under the Mining Laws of the United States.

Appellant shows no grounds for an injunction; he has not shown that he has attempted to mine the river-bed, or that Defendant has in any manner thwarted such attempt.

See: *Gaines Dry Cleaners, Inc. v. City of Chicago* (1941 C. C. A. 7), 123 F. 2d 104; also, *Weiner et al v. National Tinsel Mfg. Co.* 123 F. 2d 96; *Hannan et al v. City of Haverhill*, supra; *Carolene Products Co. of Litchfield, Ill. v. Wallace, Secretary of Agriculture et al* (1939 D. C.) 27 F. Supp. 110, per curiam opinion by Supreme Court, affirming order denying a temporary injunction 307 U. S. 612, 83 L. Ed. 1495; *Local Draft Board No. 1 of Silver Bow County, Mont. et al v. Connors* (1941, C. C. A. 9) 124 F. 2d 388; and *Wilson v. Byron Jackson Co.* (1937, C. C. A. 9) 93 F. 2d 572.

- (2) It has never been the intent of Congress, either in the General Mining Laws, or by laws adopted for the government of the Territory of Alaska, or in amendments thereto, to grant any rights to the beds of navigable streams.

Congress has never definitely declared an intent to grant either rights of possession or title to the land underneath the waters of navigable streams of Alaska. Appellant can cite no such declaration. He argues it only from inference. The laws themselves, and their interpretation by the courts, deny such inference.

(a) *The General Mining Laws of the United States.*

Section 22 of the general Mining Laws (30 U. S. C. 22) provides that—

“\* \* \* All valuable mineral deposits in lands belonging to the United States \* \* \* shall be free and open to exploration and purchase \* \* \* under regula-

tions prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.”

From the above section it is clear that the policy of Congress has been to encourage exploration and development of the country’s mineral resources (*Heydenfeldt v. Daney etc. Mining Co., Nev. 1877, 93 U. S. 634, 23 L. Ed. 995*), *but* such policy extends *only* to those lands which *belong to the United States*.

Tidelands and beds of navigable rivers have never, within the history of administration of the public lands by the the United States government been regarded as “*land belonging to the United States*.” On the contrary, such lands belong to the State, or, if located in a Territory, they are held in trust by the United States for the benefit of the people of any State, or States, organized from such territory.

In the case of *Shively v. Bowlby, Or. 1894, 14 S. Ct. 548, 152 U. S. 1, 58, 38 L. Ed. 331*, the Supreme Court held that a mining location *cannot* be made on lands lying below the line of ordinary high tide and that the Department of the Interior is without any authority to grant any cession whatever as to land so located. Quoting from the opinion:

“This case concerns the title in certain lands below high water mark in the Columbia River in the state of Oregon; the defendant below, now plaintiff in error, claiming under the United States, and the plaintiffs below, now defendants in error, claiming under the state of Oregon; \* \* \*

\* \* \* \* \*

(p. 59) “Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory.

\* \* \* \* \*

“The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. *But they have never done so by general laws*; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interests of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign *rights* in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the union.

“Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, *no title or right below high water mark*, and do not impair the title and dominion of the future state when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the constitution in the United States.

In *U. S. v. Holt State Bank et al* (1926) 270 U. S. 49, 70 L. Ed. 465, 468, the court stated:

“But, as was pointed out in *Shively v. Bowlby*, 152 U. S. 49, 57, 58, 38 L. Ed. 349, 352, 14 Sup. Ct. Rep. 548, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty of public exigency. It follows from this that disposals by the United States during the territorial period *are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.*”

(b) *Laws adopted for the government of the Territory of Alaska.*

The Organic Act of Alaska (Act of May 17, 1884, 23 Stat. 24) contained one provision from which appellant must be drawing his startling theory (see Appellant's Brief p. 13) that Congress *intended* to grant a right to mine to anyone *who had staked out an alleged claim, even in a navigable river-bed*, if it had been done "under any existing reasonable rules governing temporary possession of mineral deposits." The provision in the 1884 Act, on which Appellant's theory seems to depend, provides that,

"\* \* \* the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or *now* claimed by them, but the terms under which said persons may acquire title to said land is reserved for future legislation by Congress."

Manifestly such provision was for the benefit of "Indians or other persons" who had, *in good faith*, and *actually*, made use of the land, or had, prior thereto, asserted their claim. *Appellant does not so qualify*. Neither he nor his assignors had claimed the bed of the Niukluk River when the Act of 1884 was passed. The word in the statute is "*now* claimed by them," which means claimed as of 1884. The earliest date Appellant claims that the Niukluk River bed was staked is 1933 (R. 9).

The above quoted provision of the law was applied by this Court in *McCloskey v. Pacific Coast Co.* (1908, C. C. A. 9) 160 F. 794, where the trial court was upheld in granting a temporary injunction restraining the erection of a structure on tidelands fronting plaintiff's property because of its interference with the upland owner's free access to and from navigable waters to which his property was con-

tiguous. In the McCloskey case, this court cited *Shively v. Bowlby*, supra, and concluded (p. 797):

“There can be no doubt, therefore, that the appellee, while *it had not the right to wharf out on the tide lands* in front of its property, was, if its land abutted the shore, entitled to free access to the navigable waters at all points in front thereof, and was entitled to an injunction against the erection of any structure on the tide lands, or in the water in front thereof, which would interfere with such access. Gould on Waters, par. 547; Lyon v. Fishmongers’ Co., 1 App. Cas. 662; Shirley v. Bishop, 67 Cal. 543, 8 Pac. 82; San Francisco Savings Union v. P. G. R. Petroleum, etc., Co., 144 Cal. 134, 77 Pac. 823, 66 L. R. A. 242, 103 Am. St. Rep. 72.”

Appellant herein does not seek to enjoin appellee from erecting a permanent structure in the Niukluk River, preventing free access from the river to upland claims. In fact, appellant asserts no rights to upland claims along the river. From the descriptions of the mineral claims to which appellant asserts “possessory rights” and a “fee title”, all six of them lie “*in and across*” the *bed of the Niukluk River*, and are identified by an Initial Stake on the shore (R. 2-5).

*Shively v. Bowlby*, supra, was decided by the Supreme Court in 1894. Since the General Mining Laws were extended to Alaska by the Act of May 17, 1884,\* the extension carried them, as construed. The *Shively* decision controls, therefore, the interpretation and application of those laws to the navigable waters in the Territory of Alaska, as well as to all other parts of the United States.

Certainly there is nothing in the Organic Act providing for the government of the Territory of Alaska, and extending to it application of the general mining laws of the United States, which authorizes appellant’s assertion that “Congress intended to grant the right to mine to all persons presently in possession under any existing reasonable rule

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\* See *Bennett v. Harkrader* (Alaska, 1895), 15 S. Ct. 863, 158 U. S. 441, 39 L. ed. 1046; *Meydnbauer v. Stevens* (D. C. Alaska 1897) 78 F. 787; *Price v. McIntosh* (1901), 1 Alaska 286; *U. S. v. Ferrigan* (1905), 2 Alaska 442.

governing temporary possession of mineral deposits." Particularly not, since he thereby means himself as the person "presently in possession" of the bed of the Niukluk River!

The fact that perhaps at the time of the Organic Act (1884), miners in Alaska had staked claims in the beds of navigable rivers (perhaps then in good faith and in ignorance of the mining laws and their limitations), justifies no such statement.

The further fact that appellant only six years ago, laid claim to the bed of the Niukluk River (*not* in ignorant good faith, but in defiance of the proper limitation of the mineral laws) is poor support for his argument that Congress intended then, or intended by any later legislation, to protect his invalid claims!

There is nothing in the mining laws, in the regulations promulgated to carry them into effect, in the Organic Act, or in any construction placed upon these laws or regulations by United States courts which supports appellant's argument.

All authority is to the contrary.

- (c) *Miners in Alaska have no legal authority to make rules affecting possessory or title rights to beds of navigable streams.*

It is true that mining laws have continuously recognized the necessity and/or convenience of miners, who often work in isolated areas, to make local rules and establish customs by which their mining operations and reports may be controlled. The absence of all statutory law regulating mining was the cause of the recognition of "Miners Rules." (*Morton v. Solambo*, 26 Cal. 527). These Rules cover such matters as recording of notices, making affidavits of labor, or the methods of making proof of discovery, especially where there is no recording district (see 48 U. S. C. 383). Often miners' customs in the use of names and terms in the descriptions of a claim have been approved. (*Peca v. Huddleston* (1915) 5 Alaska 241). But Miners' rules and customs must be the actual governing force in the district and in

effect, to give them legal standing. (*North Noonday Mining Co. v. The Orient Mining Co.*, 1 Fed. 522, 530). Where recording districts have been established, and mining interests have ready access to a District Land Office maintained by the Department of the Interior, miners' rules and customs fall into disuse, and thereby lose all force and effect. (*Haws v. Victoria Copper Mining Company*, 1895, 160 U. S. 303, 40 L. ed. 436, 441).

Never has it been within reasonable construction of any statute that miners within a mining district might, by having a meeting and adopting rules, *create* thereby an estate in mineral land, or a title of any kind, "possessory," "temporary," or otherwise. *If no such title could be obtained under the mining laws* a miner's meeting could not legislate it into existence.

If it were possible for a *valid* "claim" to be perfected to the land below the waters of a navigable river in Alaska, then, it might be argued with some plausibility that miners' rules or customs could be invoked to protect a "possessory right," pending the locator's perfecting his claim. But, since claims to such land are utterly void, no meeting of miners can adopt a rule to cure the fundamental invalidity. Rules having that object are in conflict with the higher law. and are therefore void.

**(3) It was not the intent of Congress, by the Act of August 8, 1947, to confer either title, or possessory rights of any kind to the beds of navigable streams in Alaska.**

This Act merely opened the beds of such streams "to exploration and mining." It was a *privilege* the Act offered, *not* a recognition of prior property rights, nor the grant of new ones.

That this is true is clearly shown, not only by the terms of the Act itself, but by the Committee Report at the time of its passage.

This report, *see U. S. Code Congressional Service, 80th Congress, First Session 1947, page 1666*, states:



# “EXPLANATION OF THE BILL

The purpose of this bill is to make possible exploration for and mining of gold and other precious metals in the beds of navigable streams in Alaska. Such exploration and mining are not permissible under existing law.

\* \* \* \* \*

This bill would remedy the existing situation by extending the right to mine that now exists in bays, shores, and inlets, to navigable streams, subject to the jurisdiction of the War Department for the protection of navigation and the jurisdiction of the Interior Department for the protection of fisheries. Contained in this bill are safeguards aiding the Fish and Wildlife Service of the Interior Department to keep a constant check upon mining to make certain that the fish are not endangered.

The Delegate from Alaska has testified at hearings held before your committee that the people of Alaska desire enactment of this legislation. The Interior Department's report on this bill is favorable, with amendments, and is as follows:

Department of the Interior,  
Washington, April 11, 1947.

Hon. Richard J. Welch,  
Chairman, Committee on Public Lands,  
House of Representatives.

My dear Mr. Welch: This is in further reply to your request of January 16 for a report on H. R. 174, a bill to amend section 26, title I, chapter 1, of the act entitled 'An act making further provision for a civil government in Alaska, and for other purposes,' approved June 6, 1900 (31 Stat. 321), as amended by the act of May 31, 1938 (52 Stat. 588).

I have no objection to the enactment of the bill if it is amended as I suggest. It should be noted, however, that the policy embodied in the bill is inconsistent with that previously established by the Congress.

The effect of the bill would be to subject the beds of navigable streams in Alaska to exploration for and mining of gold and other precious metals. Such ex-

ploration and mining is not permissible under existing law.

\* \* \* \* \*

The beds of navigable rivers have been consistently held to belong to the States if not disposed of by the United States prior to statehood. In the continental United States, as well as in Alaska, it has in the past been the policy of the Federal Government to hold the beds of navigable rivers in trust for the future States. (See *United States v. Holt Bank*, 270 U. S. 49 (1925).) H. R. 174 would reverse this policy insofar as the precious metals in the riverbeds of Alaska are concerned, since it would permit the exploration for and mining of these metals, without compensation being paid for the benefit of the future State. As I have stated, however, this involves a policy question which is primarily the concern of the Congress.

\* \* \* \* \*

I believe that *the bill should also state clearly that persons mining in navigable streams shall acquire no title to the stream beds* and that, upon the admission of Alaska as a State, any privileges or rights acquired under the bill with respect to mining operations in the beds of navigable streams shall be open to termination by the State and that these operations shall then be subject to State law. Such a clause would give protection to the interests of the future State, and at the same time would permit mining operations in the navigable streams at present.

\* \* \* \* \*

Sincerely yours,

J. A. KRUG,  
Secretary of the Interior.' "

The Secretary of the Interior indicated certain changes in the wording of the bill, all of which were substantially incorporated in the law as passed.

There is nothing in the wording of the law, or in the committee report with relation to its meaning or intent, to justify the argument advanced by appellant (Appellant's Brief, p. 23) that Congress "intended to *confirm existing claims*," in the beds of navigable rivers.

It is submitted that the intent of Congress clearly revealed in its official report on the bill, is just the contrary. And if there be any ambiguity in the act, and we believe there is none, then the recommendation of the committee report to the effect that "persons mining in navigable streams shall acquire no title to the stream beds" is binding, and conclusive against appellant's claims.

Appellant makes much of the proviso in Sec. 2 of the Act, that "nothing in this Act shall be deemed to affect or impair any valid claims, rights or privileges, including possessory claims under the first proviso of Sec. 8 of the Act of May 17, 1884 (23 Stat. 26) arising under any other provision of law." He argues that Congress intended thereby to "*confirm*" existing possessory claims.

That is true, but the ones "confirmed" do *not* include appellant's claims! The claims confirmed are "*valid claims*" and "*possessory claims under the first proviso of Sec. 8 of the Act of 1884*", which is that Indians or other persons shall not be disturbed in the possession or enjoyment of lands actually used by them or claimed in 1884. Those were given validity by the Organic Act in 1884. Appellant's "possessory claim" does not fit the saving clause in the Act. The first proviso of Sec. 8 has been most often invoked to protect the possessory rights of an Indian family or tribe, even though another may have obtained the title of record. (See discussion, *infra*, p. 13)

(a) *This 1947 Act, like prior acts, limited the rules which miners might make to those not in conflict with mining law.*

Since the Department of the Interior has sole jurisdiction over tidelands, and its action thereon is final (see *Lewis v. Johnson*, 1902 1 Alaska 529), no Rules adopted by a miners' meeting can have the effect of modifying the Department's interpretation of the 1947 Act, or of changing the Regulations by which privileges of mining may be obtained under it.

(b) *Congress did not intend to leave the rights of possession of beds of navigable streams to be governed by miners' rules.*

The 1947 Act, like prior acts, provided for the promulgation of Regulations by the Secretary of the Interior. Also, this last statute, like prior ones, recognizes that in appropriate cases miners might make rules if not in conflict with the law or regulations. Conceivably, miners' rules might be needed and in force as to matters properly within the control of miners in some inaccessible district. The statute recognizes that *possibility*. Even if miners rules were contemplated as possibly governing "exploration and mining" of land below the line of high water mark of navigable streams, which we believe was not the intent, the 1947 statute limited such miner's authority to just "*until otherwise provided by law.*"

Regulations, duly promulgated have the force and effect of law. They set up the steps whereby the privileges of river-bed mining may be exercised, e.g., *by special notice*.

Regulations under the 1947 Act were promulgated November 26, 1947.

The miners "meeting" on which appellant relies was not held until June 28, 1948.

Hence, if Miners Rules could have had any applicability under the 1947 amendment, these were adopted too late, *after Regulations were in effect*.

Furthermore, as the Trial Court pointed out (R. 60), Appellant's "claims", and all the Niukluk River involved herein have been under the *Cape Nome Recording Precinct*, and miners rules have long been discontinued in that area. They are no longer in force and effect.

**(4) Plaintiff never acquired nor does he now have any valid fee title, possessory right or any other rights to the bed of the Niukluk River.**

The principle that no one can obtain a valid title to navigable waters has become settled in the decisions of this court. In 1908, in the case of *Decker v. Pacific Coast S. S.*

Co., 164 F. 974; this court quoted from the earlier case of *Columbia Canning Company v. Hampton*, 161 Fed. 64, as follows:

“It follows, from these authorities, that while the owner or locator of lands in Alaska which border upon navigable or tidal waters has, under the general law, the right of access to such waters for the purpose of navigation, *he can acquire no right or title to the soil below high-water mark, and he can have, therefore, no right of possession* upon which he can base an action against an intruder whom he charges with interfering with and obstructing him in the erection and use of a structure upon the shore below such high-water mark.”

“The court said further:

“He may have, however, a right of action against an intruder who places obstacles on the shore that prevent him from having access to the navigable waters.”

“This is the general rule, and is designed to keep navigable waters free and open to the public for commerce and navigation, and at the same time permit the littoral owner and those engaged in commerce and navigation to have access to navigable waters . . .”

**(5) Plaintiff's alleged claim of title to the minerals in the bed of the Niukluk River is not made in good faith.**

It has long been a practice of the United States in weighing rival claims to recognize, even in the absence of a full compliance with the law the prior claimant who has maintained continued occupation *in good faith* (Act of May 14, 1898, c. 299, p. 10, 30 Stat. 413, 48 U. S. C. 463).

This record reveals no basis of good faith for appellant's alleged claim of an exclusive “possessory right” in the bed of the Niukluk River.

The record shows that he knew of the ouster by the United States, of Glass and Nels Swanberg, from these Niukluk claims, in 1941; that he began taking deeds to Niukluk river-bed claims in 1942; that in 1946 he obtained

a "Warranty Deed" from Glass and his wife; that in 1947 when the law was passed extending the privilege, revokable, and non-exclusive, for any qualified person to mine the Niukluk River bed, he, learning of Defendant's plans to do so, served notice that he held that river-bed as his own, and would commence legal proceedings against anyone who attempted to mine it; that he well knew he could obtain the same privilege of mining the Niukluk as others; that he did not do so; that he let eleven months elapse and then filed this suit asking for an injunction pendente lite to restrain Defendant from further operations; that he knew the Secretary of the Interior had issued Regulations setting forth the steps necessary for anyone to claim the privileges accorded under the 1947 Act to mine the Niukluk legally; that seven months after such regulations became effective, he called a purported Miners' Meeting, had himself elected Chairman, and with the influence and votes of six directly connected with his claims, out of sixteen voters, he had "Rules," adopted denominated "Miners' Rules of Miners' Meeting, Council, Alaska," pretending to validate his "exclusive possessory rights," and that he presented such rules in an affidavit to the District Judge as authority for his claim of *exclusive* right to the bed of the River.

At all times Plaintiff knew his claims in the bed of the Niukluk River were invalid, but he acted in defiance of the law, with only one purpose, to wit: to prevent Defendant from using the privilege extended by Congress to any who might qualify under the law and Regulations to mine Navigable Rivers of Alaska.

- (6) **The miners' meeting and the rules adopted were under the control of appellant, and they added nothing to his invalid claims.**

Reference is made to the statement of facts, pages 4 and 5, and to argument under IV (2) (c) pages 15 and 16 above.

- (7) **The Trial Court properly construed the law, and its denial of appellant's application for an injunction pendente lite was an exercise of sound discretion.**

In Appellant's brief he twice alludes to the fact that the record does not show that Defendant filed the notice required under the Regulations of an Intent to Mine. Apparently he makes this statement as a sort of answer to two paragraphs in the court's opinion, (R. 61) namely:

"The record fails to show that he (plaintiff) has filed with the Secretary of Interior the notice of intention to prospect or mine the bed of the stream."

and—

"He (plaintiff) must depend upon the strength of his own title, and not the weakness of that of his opponent. \* \* \* He has failed to show, either in his pleadings or his affidavits, that he has complied with the rules and regulations of the Secretary of the Interior . . ."

It is no answer to the court's findings, quoted above, for appellant to aver that the record does not disclose "that Defendant has ever filed any notice of intention to mine as required by the regulations of the Secretary of the Interior."

The court's order denying the injunction pendente lite was after a "hearing" (R. 48) and although the printed record does not contain a copy of it, appellant well knows that appellee *did* file a "Notice of Intention to Mine," and that the trial court knew it too.

Under the well recognized principle that this court may take judicial notice of Land Office Records (*Red Canyon*

*Sheep Co. v. Ickes*, 69 App. D. C. 27, 31, and *Fletcher v. Evening Star Newspaper Co.*, 72 App. D. C. 303, 308, 114 F. 2d 582) a certified copy of appellee's notice is hereto attached as an exhibit to this brief.

That appellant is wrong, and the trial court was right in construing the 1947 Act is shown by the case of *Heydenfeldt v. Daney* (1877), 93 U. S. 634, 23 L. Ed. 995, which presented the question of the proper interpretation of the mining laws of the United States. There, the court said:

“It is true that there are words of present grant in this law; but, in construing it, we are not to look at any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it. ‘It is better always,’ says Sharswood, Judge, ‘to adhere to a plain common sense interpretation of the words of a statute, than to apply to them refined and technical rules of grammatical construction.’ *Gyger’s Estate*, 65 Pa. St. 312. If a literal interpretation of any part of it would operate unjustly, or lead to absurd results and be contrary to the evident meaning of the Act taken as a whole, it will be rejected; and there is no better way of discovering the true meaning of a law when there are expressions in it which are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced the Legislature to pass it. With these rules as our guide, it is not difficult, we think, to give a true construction to the law in controversy.

\* \* \* \* \*

“\* \* \* there are words of qualification in this grant. And these words restrict the operation of the words of present grant. If their literal meaning be taken, they refer to past transactions; but evidently they were not used in this sense \* \* \* .”

The *Heydenfeldt* case was later applied by the Supreme Court in *Karnuth v. United States* (1929), 279 U. S. 231, 243, 73 L. Ed. 677, where it is stated:

“The true sense in which the word was here employed will be best ascertained by considering the policy, necessity and causes which induced the enactment (citing cases).”



The "policy, necessity and causes" inducing the Congress to open the beds of navigable rivers to mining were to stimulate mining exploration, operations and business in the Territory of Alaska. The development of such business enterprises would help rather than hinder the establishment of a state, or states, out of that vast northern territory. The mining laws clearly recognize that the Federal Government holds beds of navigable rivers and tidal lands *in trust* for all the people, and to be ultimately administered by the state or states established in such territory. The policy of stimulating business in the territory is in line with such trust holding by the United States Government. The grant, or recognition of any fee title, or other "*rights*", in the nature of ownership of any kind in such lands, would be contrary to such trust holding. The law passed therefore in 1947 opening navigable river beds to mining operations should be construed in the light of the "causes which induced the enactment". Such an interpretation completely precludes any form of "ownership", "title", or "possessory right" in appellant. It likewise precludes the interpretation advanced by appellant for the reference in the statute to miners rules, as an intent by Congress to grant to miners in the district the right to decide questions of ownership in the beds of the navigable streams opened by the law to mining operations. The "causes which induced the enactment" of the 1947 statute compel the interpretation that the statute is limited strictly to extending a *privilege*, available alike to all who comply with the statute and regulations, rather than any recognition, confirmation or grant of a property right of any kind, possessory or otherwise.

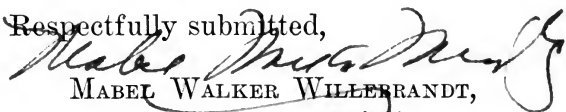
### CONCLUSION.

Appellant's application for an injunction pendente lite is without foundation since he has shown no threatened injury. (*Spielman v. Dodge*, 295 U. S. 89, 96). Appellant has set up no valid right or title, justifying his interlocutory

protection. His claims to the bed of the navigable Niukluk have no legal status. No Miners Meeting Rules can give them validity in any degree. Congress has given them no sanction in the 1947 Act. Appellant has presented no allegations or facts justifying the exercise of the emergency powers of the court in his protection.

It is respectfully submitted that the Trial Court's denial of an injunction pendente lite was right, and, under the principles of law announced by the Supreme Court of the United States, and by this Court, should be affirmed.

Respectfully submitted,



MABEL WALKER WILLEBRANDT,

Title Insurance Building,  
Los Angeles, California,  
Shoreham Building,  
Washington, D. C.,  
*Attorney for Appellee.*

*Of Counsel:*

C. C. TANNER,  
Nome, Alaska.





ADP"

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UNITED STATES  
DEPARTMENT OF THE INTERIOR  
Bureau of Land Management  
~~GENERAL LAND OFFICE~~

WASHINGTON

APR 27 1949

I HEREBY CERTIFY that the annexed photostatic copies  
of letters filed under Miscellaneous Matter No. 10720, are

true and literal reproductions of the records on file in  
this office in my possession.

IN WITNESS WHEREOF, I have hereunto subscribed

my name and caused the seal of  
this office to be affixed, at  
the city of Washington, on the  
day and year above written.



*John F. W. Jones*

~~Assistant Commissioner of the General Land Office~~

Chief, Patents Section.



**AIR MAIL**



IN REPLY REFER TO:

**10700, 72**

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
WASHINGTON 25, D. C.

AUG 28 1947

**MEMORANDUM**

**To: Regional Administrator, Region VII, Anchorage, Alaska.**

**From: Director**

**Subject: Dredging for Gold in the Beds of Alaskan Navigable Streams.**

This is in reference to your memorandum of August 22, transmitting a copy of a notice of intention to dredge in the Minkik River, filed by the Alaska Placer Company. You state that you have advised the Acting Manager at Nome to inform that Company not to start operations until regulations have been promulgated.

The recent Act of August 8, 1947 (Public Law 383, 80th Congress) authorizes the exploration and mining for gold, and other precious metals, in the beds of navigable waters of Alaska.

Pending the issuance of regulations under that Act, the appropriate district land offices are authorized to accept notices of intention to dredge and mine for such metals in the beds of navigable waters, provided the person filing the notice furnishes all of the information called for by 43 CFR, Gen. Supp. Sec. 69.13 (Circular 1454, February 17, 1939). There is therefore no need of delaying such dredging operations until such time as the new regulations are formally issued.

Copies of this memorandum are being transmitted to each of the three District Land Offices in Alaska.

*W. W. Johnson*  
Director.

cc: District Land Office, Nome  
" " " Fairbanks  
" " " Anchorage

**OFFICIAL COPY**

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UNITED STATES  
DEPARTMENT OF THE INTERIOR  
Bureau of Land Management  
Washington 25, D. C.

~~CONFIDENTIAL~~

SEP 18 1947

Alaska Placer Company,  
327 Colman Building,  
Seattle 4, Washington.

Gentlemen:                      Attention: Ralph Lemon, Vice President.

Reference is had to your letter of August 27 concerning Public Law No. 383.

The act of August 8, 1947 (Public Law No. 383, 80th Congress) authorizes the exploration and mining for gold and other precious metals in the beds of navigable waters of Alaska.

Pending the issuance of regulations under the act the appropriate District Land Offices are authorized to accept notices of intention to dredge and mine for such metals in the beds of navigable waters provided the person filing the notice furnishes all of the information called for by Circular No. 1454 of February 17, 1939 (43 CFR Cum. Supp. Section 69.13). There is therefore no need in delaying dredging operations until such time as the new regulations are formally issued.

A copy of Circular No. 1454 is enclosed for your information. Copies of Public Law No. 383 are not available in this Bureau, but may be obtained from the State Department.

The matters presented in your letter of August 28 will be duly considered in connection with the preparation of the regulations.

Very truly yours,

*L. W. Johnson*  
Director.

Enclosure

LHD/jah 9/8/47

OFFICIAL COPY



UNITED STATES  
DEPARTMENT OF THE INTERIOR

Bureau of Land Management  
~~GENERAL LAND OFFICE~~

WASHINGTON

APR 20 1949

I HEREBY CERTIFY that the annexed stostatic copies  
of papers filed under Nome 01018,

true and literal exact reproductions of the originals on file  
in this office in my custody.

IN WITNESS WHEREOF, I have hereunto subscribed

my name and caused the seal of  
this office to be affixed, at  
the city of Washington, on the  
day and year above written.

*James F. Homer*

~~Assistant Commissioner of the General Land Office~~

Chief, Patents Section.



Original / Given / Ser. No.  
Feb. 2, 48 01018  
11: 47.

ALASKA PLACER COMPANY.

RECEIVED  
U.S. LAND OFFICE  
NOME, ALASKA

DATE SEP 10 1947  
Nome, Alaska, Sept. 6th, 1947.  
HOUR

District Land Office, under  
Bureau of Land Management,  
Nome, Alaska.

Supplemental Notice.

Dear Sir:-

Supplementing the notice of Alaska Placer Company, an Alaska corporation, filed in your office Aug. 14th, 1947, of its intention to dredge for gold and other precious metals, in the bed of the Niukluk River, a tributary of Fish River, Cape Nome Precinct, Second Division, Territory of Alaska, under the provisions of Public Law 383 of Aug. 8th, 1947, the Alaska Placer Company submits the following additional information:

The officers and directors of Alaska Placer Company, all native born citizens of the United States, together with their addresses, are as follows:

Carl J. Lomen, Nome, Alaska,	President.
Ralph Lomen, Seattle, Wash.,	Vice President.
F. Clinton Austin, Seattle, Wash.,	Vice President.
Everett P. Wood, Seattle, Wash.,	Secretary - Treas

All Seattle Addresses are "Colman Building, Seattle, 4, Wash.

The dredging operations contemplated in the bed of said Niukluk River will commence opposite, and just below U.S.L.M. 1152, in Lat 64 degrees 53' N., Long. 163 degrees 40' W and the proposed dredging area will approximate the shaded area as shown on the map attached herewith and made a part of this supplemental notice.

This information is filed in accordance with Sec. 69.13 (2) of Circular No. 1454, issued by the United States Department of the Interior General Land Office, Washington, D.C. and dated February 17, 1939.

This company expects to commence dredging operations this season, and as soon as its dredge can be placed on location.

Very truly yours,

ALASKA PLACER COMPANY,

by

*Carl J. Lomen*  
Carl J. Lomen, President.

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Original

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ALASKA PLACER COMPANY.

Given - Ser. No.  
Feb. 12, '48 01018

Nome, Alaska, Aug. 14th, 1947.

RECEIVED

U.S. LAND OFFICE  
NOME, ALASKA

DATE AUG 8 1947

HOUR AUG 13 1947

District Land Office, under  
Bureau of Land Management,  
Nome, Alaska.

Dear Sir:-

Please be advised that the Alaska Placer Company, an Alaska  
corporation, intends to dredge and carry on dredging and other mining  
operations in the bed of the Niukluk River, a tributary of the Fish River,  
Nome Precinct, Territory of Alaska, under the provisions of Public Law  
No. 1152, of Aug. 8th, 1947.

Such dredging operations will commence a short distance below the  
mouth of Melsing Creek, a tributary of said Niukluk River, close to U.S.L.M.  
No. 1152, and along and in front of mining locations embraced in Patent #1152, Ser. No. 26-  
and dredging down stream from said point of commencement. (Min. Surv.)

Such operations are expected to commence within a very few days.

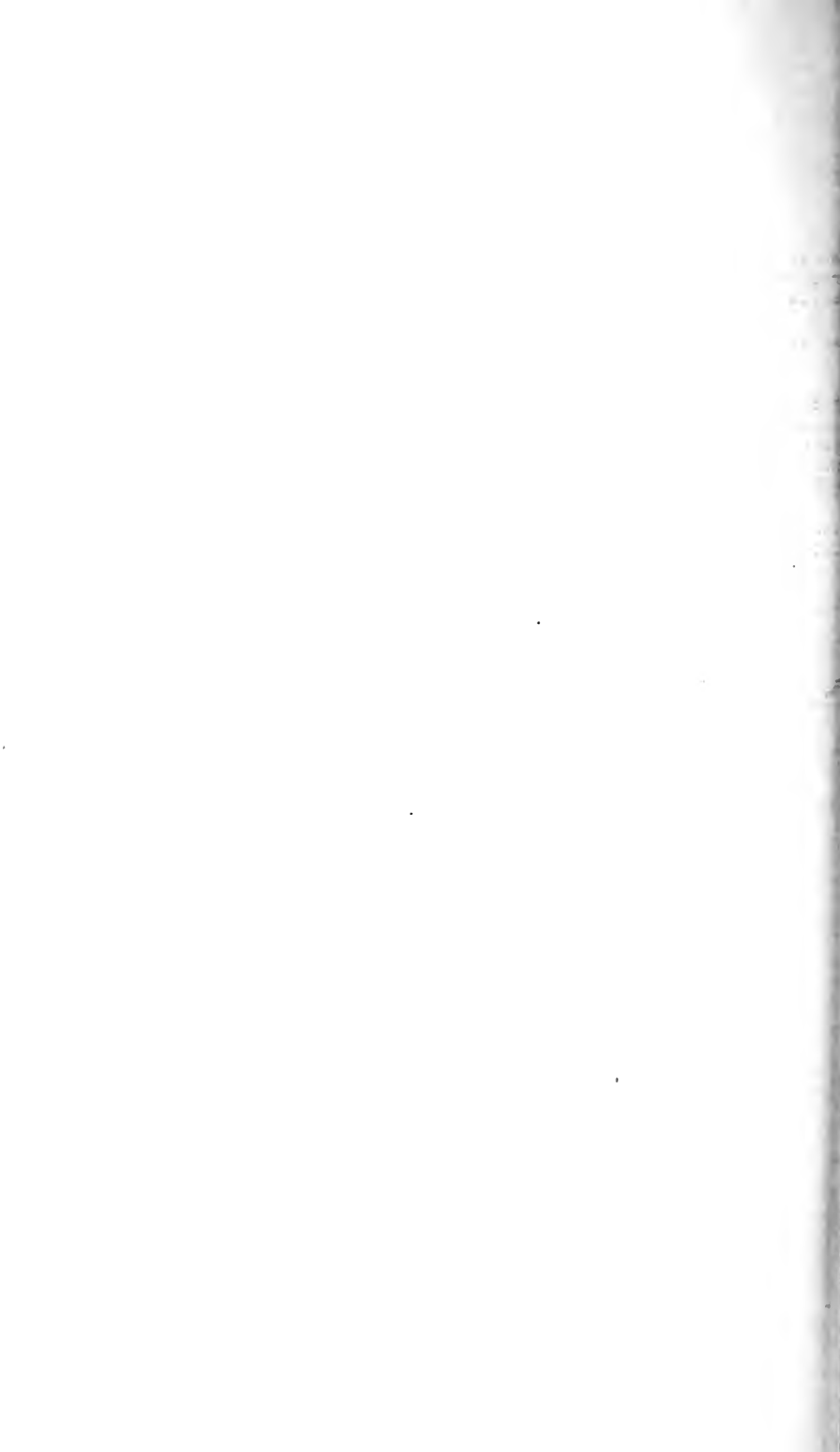
Very truly yours,

ALASKA PLACER COMPANY,

by

*Bar J. Loman*

President.





No. 12,069

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

F. K. DENT,

VS.

ALASKA PLACER COMPANY,

*Appellant,*

*Appellee.*

REPLY BRIEF FOR APPELLANT.

---

COLLINS & CLASBY,

CHARLES J. CLASBY,

Box 1368, Fairbanks, Alaska,

*Attorneys for Appellant.*

FILED

JUL - 5 1949

PAUL P. O'BRIEN,



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No. 12,069

IN THE

**United States Court of Appeals  
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---

F. K. DENT,

*Appellant,*

VS.

ALASKA PLACER COMPANY,

*Appellee.*

---

**REPLY BRIEF FOR APPELLANT.**

---

**I.**

**STATEMENT OF THE CASE.**

Portions of the statement of the case by appellee are deserving of comment from a factual standpoint. I will comment on the statement in the order it appears on pages 2 to 5 of appellee's brief:

(a) In the opening paragraph defendant refers to the map of its proposed operations (R. 31) filed with the U. S. Engineers, War Department. It is significant that this map shows mining claims having different names from those in litigation here, yet covering the same ground! Defendant makes much of the history of plaintiff's locations, yet claims no prior locations. The obvious deductions are that de-

fendant's map shows mineral locations claimed by it, and that such locations are a re-staking, in part at least, of the ground claimed by plaintiff. The act was passed August 8, 1947, and the map (R. 31) and the request for War Department permit (R. 26) shows date of August 22, 1947. The law permits of but two mineral locations a month; so we can safely presume these claims were staked by defendant prior to the passage of the act.

(b) Defendant states (Brief 3) that plaintiff's claims appear to lie wholly within the bed of the river. We submit that defendant's map (R. 31), showing Melsing Creek and a scale, make it obvious from the descriptions of plaintiff's claims (R. 3-5) that this is not true.

(c) Defendant states that six of the persons at the miners meeting (Brief 5) are "directly interested in the pending suit." If the writer means to imply this action, they are certainly not parties. If she is intending to imply that they have an interest in the mining claims, then the fact is that defendant has gone to great lengths to prove that they *have not*, and have deeded all their interests to plaintiff. If it is her meaning of the word "interested" that these persons are "curious concerning" and "concerned about" the *decision* in this case, then the statement is correct. Each and every person in attendance at the miners meeting was as interested and concerned as plaintiff herein; and further, the result of this proceeding is as vital to them as to plaintiff. The de-

cision in this case more than affects the parties, it affects a large part of a large and vital industry.

(d) Defendant claims in its brief (p. 5) that its president refused to take part in the miners meeting. The record (R. 46) shows "a lengthy discussion followed", then on vote, that "The following members refused to vote *either for or against*\*: Ralph Loman, Warren Davis, Charley Gustavson." As defendant took the liberty of indulging in the presumption that Nels Swanberg, Jr., is the son of Nels Swanberg (a party in *U. S. v. Lucas* as administrator of the estate of a decedent), we indulge in the presumption that Ralph Loman, Warren Davis and Charley Gustavson were employees of defendant.

---

## II.

### ARGUMENT.

In reply to the argument of defendant we will first follow the outline presented in defendants brief (pp. 5-7).

(1) It is defendant's position that the denial of an injunction *pendente lite* is a discretionary matter not reviewable except if improvidently exercised. With this statement of the law we have no quarrel, nor do we dispute the sound reasoning of the cases in that respect cited by counsel. However, this proceeding is one to try title to real property, property ex-

---

\*Emphasis in this brief is that of the writer.

hausted by the mining of defendant. The injury is an irreparable one to an estate of plaintiff; and injunctive relief essentially an ancillary remedy to preserve the *status quo* while title is being tried. The well-founded principles of granting such relief are well stated in this court's opinion in *Wasky v. McNaught* (9th Cir., 1909) 163 Fed. 929 an appeal from Alaska in an ejectment case on mining claims. The Court therein stated the case thusly:

“The plaintiffs brought this suit in ejectment to recover the possession of a portion of a mining claim which the defendants had entered and ousted the plaintiffs. The value of the ground in controversy consists in the gold-bearing earth, sand and gravel contained therein. The defendants admit they are severing and extracting this gold-bearing material and depositing it in a dump on the premises. *The extraction and removal of this gold-bearing material from the ground will necessarily destroy its value and render ineffectual any judgment that may be obtained in the ejectment suit for the possession of the ground.* The plaintiffs, to protect their interests in this respect, have appealed to the remedy by injunction.”

In referring to the interpretation of the New York statutes from which the provisions in Alaska were drawn, this Court in the same case further said:

“ ‘The subject of the action’ is the mining ground *in controversy* and the mineral therein contained, and the injunction is for the purpose of preventing the removal of the mineral, which constitutes the value of the mining ground, and which it is the right of the plaintiffs to have preserved. If



it be true, as alleged in the complaint in ejectment, that the plaintiffs are the owners of the ground, it would certainly be in violation of their rights 'respecting the subject of the action' for the defendants to destroy the estate by removing its value." \* \* \*

"The essential value of the injunction in this case is to prevent further irreparable damage *pending the determination of the legal rights of the parties to this ground.*"

We do not hold that the Court has no discretion. If in a case title depended on several factual issues upon which evidence was conflicting, and it appeared doubtful that the moving party would be successful the Court could deny injunctive relief *pendente lite*; and such an order would be sustained on appeal.

But, where the facts are not in controversy, as here; where defendants are, factually, interlopers claiming no title (title in the sense of exclusive right of possession); and factually where the plaintiff's right to exclusive possession stands or falls on the interpretation of a statute, the matter is not discretionary. The District Court did not "exercise discretion" in denying the injunction, or "improvidently exercise" his right: The injunction was *denied solely because the Court interpreted the law to mean plaintiff had no right that defendant violated*. We are not here, therefore, to review whether the Court "improvidently exercised discretion", but to determine whether, under the clear state of facts, the law granted to plaintiff an exclusive right of possession.

(2) Defendant next contends in its brief (p. 10) that it has never been the intent of Congress by the General Mining Laws, or special acts for Alaska, to *grant rights to the beds of navigable streams*. This statement, for the period prior to the act of August 8, 1947, is correct, and one with which we have no quarrel.

I am unable to follow the reasoning in (2) (b) and (c) of defendant's brief, or to understand the applicability thereof to this case (pp. 13-16). We are not here involved with the *general* mining laws of the United States, or any of the *general* rules applicable to mining claims, or the rights of miners *in general* to make rules or initiate rights. We are concerned only with the act of August 8, 1947, and its interpretation; for which we look to the act itself and to *the similar special acts* relating to the Bering Sea, and later the Alaska Coastal tidelands, and shoals, and the application of these acts in custom and usage both before and after adoption.

I think the fundamental misconception of defendant is the following expression on page 16 of appellee's brief:

“(3) It was not the intent of Congress by the Act of August 8, 1947, to confer either title or possessory right of any kind to the beds of navigable streams in Alaska.”

It was certainly not the intent of Congress to convey title in the sense of a defeasance from the United States. This act, like its predecessors, applied to areas

*not a part of the public domain*, and consequently not subject to *purchase under the laws relating to patent*. That such was not said in so many words in prior acts does not add to the specific proviso in that regard in the last act. The expectancy of early statehood for Alaska, within the probable life of mining operations anticipated under the act, made it advisable, and praiseworthy, for Congress to caution that the fee of such lands could not be acquired, would be transferred to the state when created, and that

“Any *right* or privileges acquired hereunder \* \* \* shall be terminable by such state, and the said mining operations shall be subject to the laws of such state.” (Act August 8, 1947.)

We submit that such would follow as a matter of course; and the significance of the enactment is the warning thereby given.

However, the intent of Congress to grant possessory rights could hardly be more clearly stated:

“\* \* \* shall be subject to exploration and mining \* \* \* under \* \* \* rules \* \* \* *governing the temporary possession thereof*.” (Act August 8, 1947.)

Not being able to acquire the fee it follows that the only estate acquirable was the right of temporary possession. Defendant blandly ignores this provision of the act, *and our claim of right thereunder* (stigmatizing my use of the word “title” as a claim to the “fee”), reason that miners have no rule making authority, and that if they do, regulations by the Secretary of Interior supersede them. They even

reason that since the Department of Interior has *sole jurisdiction over tidelands* (Brief 19) Congress had no authority to give rule power to miners by the act of August 8, 1947! And even if it did, such power could be nullified by department regulations. Further (4b, Brief 20) the department rules had the *force and effect of law* (on a level equal to an Act of Congress we presume), so were, when made, law that, *by virtue of touching the subject* forever barred miners from adopting rules in accordance with the statute.

Beside the obvious fallacies of such reasoning stands the clear language of the act:

*First.* The Secretary of Interior may make *general rules and regulations* for the preservation of order and the prevention of injury to fisheries. *And nothing more!* Any rule or regulation of the Secretary that is *not general in its application*, and is not founded on the preservation of order or the protection of fisheries is a nullity. It would mean absolutely nothing and could be completely disregarded with impunity.

*Second.* The right of temporary possession is such as may be set up by reasonable rules and regulations of miners, heretofore or hereafter made. Any rule or regulation by miners not reasonable, or not founded on settling rights of temporary possession would be a nullity. Miners have no right by rule to protect fisheries. Conversely, the Secretary has no right by rule to control temporary possession. The two powers complement

each other, but are distinctly separate; and one mining or proposing to mine would be compelled to observe the proper regulations of each.

That the Secretary of Interior recognizes this to be true is obvious from his regulations. (R. 33-37.) After citing that the act permits mining

“\* \* \* subject to certain conditions.”

the regulations then say (Sec. 69.12):

“It is the purpose of Section 69.12 to 69.18, inclusive, to set forth the *conditions* under which exploration and *mining operations* shall be conducted.”

Nowhere in the regulations is exploration controlled. Section 69.13 requires the filing of a notice of intent to mine

“\* \* \* *before commencing actual mining operations* \* \* \*”

Section 69.14 says

“In order to assure the preservation of order and the avoidance of conflict, *each dredge* \* \* \* shall not be interfered with \* \* \*”.

Section 69.15 provides for *dredge locations* so as not to block navigation.

Section 69.16 requires observance of the laws for the protection of fisheries.

Sections 69.17 to 69.18 merely re-state parts of the act, and the effective date of the regulations.

*Nowhere in the regulations does the Secretary encroach on the right of miners by rule to govern rights of temporary possession.*

We are astounded at counsel's charge in part (5) (Brief 21) of bad faith on the part of plaintiff. Out of fairness to counsel preparing the brief I am compelled to say that she has not been completely informed. The record shows that plaintiff acquired these claims when defendant's predecessors were stopped from mining them by *U. S. v. Lucas*, but does not show he tried to mine the *claims in contravention of the court's judgment*. He didn't. The Memorial of the Territorial Legislature (appendix appellant's brief) and the Act of August 8, 1947, speak for the activity of plaintiff. From *U. S. v. Lucas*, and the resumption of mining by defendant about September 15, 1947, it appears that defendant's dredge had been setting nearby during the interim! So defendant jumped the ground, saying: "This is no longer yours, it belongs to all." Meanwhile plaintiff's dredge is many miles away, can only be moved in the winter, and then only at a cost of \$25,000 or \$30,000. Defendant's dredge operated about 20 days in 1947 (R. 10), then shut down for winter. Mining is closed in that area from about October 1 to near June 15 of the following year. What happened between plaintiff and defendant over the winter in their Seattle offices is not revealed in the record. The record does show that this action was commenced as quickly as prudent preparation could be had after mining was resumed in 1948.

While defendant's conduct may be in keeping with certain views on business ethics, it is hardly in a position to complain that plaintiff's appeal to the courts is an act "in defiance of the law".

In part (7) of her brief (p. 23) counsel for defendant claims plaintiff *and the trial Court* knew defendant had filed a Notice of Intent to mine! The Court could only have known it by private investigation of the Land Office records; and had it made such an investigation the same records would have disclosed plaintiff's notice! We could have produced that record below; and we could follow defendant's enlargement of the record by placing it in appendix to this brief. (R. 52-54.) However, we fail to see any effect in such a notice.

Defendant would have us believe that it was Congressional design that no exclusive temporary possession rights be granted, as that would *best promote mining!* This is fantastically absurd. Defendant's own record shows that in 20 days in 1947, and less than 60 days in 1948 he mined through approximately five claims, or 6600 feet (complaint, answer and map on R. 31), and claims (R. 41) that it must mine a full season to have any fair chance of making a profit. The map shows the stream to be hardly wide enough for two dredges. What would defendant do if plaintiff planted his dredge 500 feet in front of that of defendant? What then would be the economy of its operations, and its "reasonably fair chance of making a profit?" What a sweet race down the paystreak that

would be. And what a great loss in side economic dredge limits, a permanent loss to the country of a natural resource.

It is impossible to place a drag-line outfit, or small second-hand bucket dredge outfit on any stream in Alaska, ready to mine, for under \$90,000. It takes good ground, better than 50 cents a yard, to average \$1,000 daily; and the average season is 100 days. Operating costs will run about 80% of gross; so it is obvious even a small outfit *must have five seasons operations to return the investment*. Can such be economically justified where there can be no exclusive right of possession to more than an area 200 feet by 500 feet? (R. 34-35.) That is hardly ten days mining. And this is but an illustration of a peanut-sized outfit, capable only of handling high-grade shallow ground.

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### III.

#### CONCLUSION.

One cannot help but be struck by the record made by defendant with the affidavits of Ralph Loman, and by the brief of counsel, but that every possible subterfuge, innuendo and accusation is used, with full stops and play on passion, to divert the attention of the Court from the fundamental issue. I have noticed that such tendencies by parties and their counsel generally conceal an abiding fear of open discussion of the pertinent issue.



The position of appellant is made plain in his opening brief. Congress by the Act of August 8, 1947, permitted exclusive rights of temporary possession to be acquired, *not under the general mining laws*, but under the rules of miners, "*heretofore or hereafter*" adopted. Do the locations of plaintiff qualify for that right?

We think there can be no question under the act but that miners can make rules—and that claims staked, or "perfected" in accordance with such rules can carry the right of possession. Also, the Territorial Legislature under the act could have superseded miners rules by legislative acts specifying what must be done to secure the right of temporary possession, compliance with which would perfect the right.

But here the facts are *that irrespective of the validity thereof* plaintiff, and many others in Alaska, claimed mineral deposits in navigable streams *on* August 8, 1947, and recognized such rights as between themselves; such claims by *custom and usage* being initiated and held in the same manner as those on the public lands. Had there been miners' rules "*heretofore made*" there is every reason to believe that they would have stated this custom. Could then there have been any doubt as to plaintiff's right instantly upon passage of the act of August 8, 1947?

Let us not let the decision in *U. S. v. Lucas* blind our eyes. That decision does not mean the Niukluk River upstream from Council may not be declared navigable. Upstream off the mouth of Ophir Creek where defendant's dredge operated for many seasons; and

upstream some 14 miles where there is a dredge at Camp Creek sometimes operated by plaintiff. If the stream be not navigable compliance with the general mining laws is sufficient. But until tested in Court or in a proceeding toward patent, who is to know? Is it not wise that the same practices that initiate and hold claims on the public domain apply as well, by custom and usage, to the streams and rivers of Alaska? With this there can be no quarrel. We submit that Congress, by the Act of August 8, 1947, in opening navigable rivers in Alaska to mining, used language susceptible to no other construction than an affirmation of rights of temporary possession acquired then, or later acquired, in accordance with miners' rules or custom then existing, or thereafter made.

Dated, Fairbanks, Alaska,

June 27, 1949.

Respectfully submitted,

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